Neutral Citation Number: [2021]EWCA Civ 1223

Case No: B4/2021/0173

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
The Hon Mr Justice Mostyn
FD18P00811

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 August 2021

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE BAKER
and
LORD JUSTICE STUART-SMITH

- -

IN THE MATTER OF THE SENIOR COURTS ACT 1981
AND IN THE MATTER OF S (CHILDREN) (INHERENT JURISDICTION: SETTING ASIDE RETURN ORDER)

Between :

GC	**Appellant**
- and -	
AS	**Respondent**

- -
- -

William Tyler QC and Emily James (instructed by **Expatriate Law**) for the **Appellant**
Henry Setright QC and Cliona Papazian (instructed by **Freemans**) for the **Respondent**

Hearing date : 29 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Friday 13 August 2021.

LORD JUSTICE BAKER :

1. This is an appeal against an order made on 11 January 2021 dismissing applications by the mother under the inherent jurisdiction in respect of her children who are residing with their father in Libya. Permission to appeal was granted by Moylan LJ on 10 March 2021.

Background

2. The mother was born in England and is now aged 41. The father, now aged 38, was born in Tripoli in Libya. They met in England in 2007 and started a relationship, and in 2008 went through an Islamic marriage in Brighton. In 2013, after the father had obtained a Masters degree in Law from an English university, they moved to Tripoli for a few months. By the end of that year, the mother was pregnant, and in November she moved back to stay with her parents in England. In April 2014, the father returned to this country and the parties resumed living together. The following month, the mother gave birth to their first child, D, and in January 2016 to their second child, E. In September 2016, the father, who had previously been given indefinite leave to remain, was granted British citizenship. In September 2017, the mother gave birth to the parties' third child, F.

3. In December 2017, the parties and the three children travelled to Turkey on one-way tickets booked by the mother. They met with members of the paternal family for a holiday, before all travelling on to Libya on 26 December 2017. In a judgment in subsequent proceedings in this country to which I shall turn shortly, it was held that at that point the parties had agreed to move with the children to live permanently in Libya. Two weeks later, however, in January 2018, the mother returned to this country alone to attend an appointment in relation to a benefits claim. The mother had expected that the youngest child, F, would be travelling with her, but shortly before their scheduled departure the father advised her that he had not been able to secure an exit visa for F. During the early part of 2018, and while in England, the mother made contact with English solicitors, Dawson Cornwell, a lawyer in Libya, the Libyan embassy, Reunite, and others, seeking advice about her situation. Over the course of 2018, the mother travelled between Libya and England on several occasions. Throughout this period, the children and the father remained in Libya. In September 2018, the mother returned to England and thereafter has not visited Libya again. Since that date she has had only indirect contact.

4. In November 2018, the mother started proceedings in the Family Division of the High Court seeking the summary return of the children to this jurisdiction. She asserted that the children had been "forcibly" retained in Libya by the father who, she claimed, was shortly due to travel to this country. At a preliminary hearing, conducted without notice to the father, the children were made wards of court, and a Tipstaff passport order was made, with the aim of preventing the father leaving the jurisdiction after his arrival. In the event, the father did not travel to England at that time, or at any time since. In April 2019, he sent the mother an invitation to apply for a visa in Libya, but she did not take it up.

5. After several interim hearings, the wardship proceedings were listed for "a fact-finding hearing to determine the issue of the habitual residence of the children and thereafter whether or not the court has jurisdiction to proceed to make orders in respect of the

children." The hearing took place over two days in September 2019 before HH Judge Hillier sitting as a deputy High Court judge. Both parents gave oral evidence, the mother attending court and the father joining by video link from Libya. Judgment was reserved and handed down on 25 October 2019. In a lengthy analysis the judge found that the mother had told lies in the course of the proceedings and the father had deceived the UK immigration authorities when applying for asylum in a way which the judge described as "sophisticated, planned and totally dishonest". She found that they had agreed to move with the children to live permanently in Libya in 2017, rejecting the mother's case that they were only visiting Libya on holiday, and therefore concluded that the children had not been wrongfully removed from England. She further rejected the mother's alternative claim that the children had been wrongfully retained in Libya in January 2018 when the mother returned for the first time to England to attend the benefits appointment. Finally, she concluded that, by the date of the mother's application to the Family Division at the end of November 2018, the children had acquired habitual residence in Libya. She concluded that the courts of England and Wales did not have jurisdiction in matters of parental responsibility over the children pursuant to Articles 8 or 10 of Brussels IIA and therefore dismissed the mother's application for an order for the summary return of the children.

6. At the end of her judgment, the judge added this coda:

> "Parens patriae
>
> 134. The court has jurisdiction in relation to British citizen children by virtue of their nationality: the inherent *parens patriae* jurisdiction. The current state of the law is not entirely clear, given the various different (obiter) dicta emerging from the UK Supreme Court in *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4, [2016] 2 WLR 557 ….
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> 135. Mr Edwards [counsel for the father] pre-emptively defended any suggestion that this court should exercise its *parens patriae* jurisdiction in the current case.
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> 136. In the event, however, there has been neither a formal application nor any submissions on behalf of the mother asserting that the court should exercise its *parens patriae* jurisdiction, whether on welfare/protection grounds or for reasons deriving from *forum necessitatis* arguments.
>
> 137. Accordingly, I need not burden this judgment either with analysis of the modern scope of this ancient jurisdiction or with consideration of whether, in the absence of both a wrongful retention and of habitual residence at the relevant date, the court should consider making any orders by this route."

7. Permission to appeal was granted against the judge's decision on the application for summary return. By supplemental application, the mother in addition sought permission to argue that the judge should have investigated whether it was appropriate to exercise the *parens patriae* jurisdiction. At the outset of the appeal hearing, this Court (Bean LJ, Baker LJ and Cobb J) heard brief submissions on whether they should permit this

additional ground to be advanced. In his judgment, Cobb J (with whom the other members of the Court agreed) indicated that he would refuse permission to the mother to be allowed to rely on the additional ground, for three reasons, set out at paragraphs 55 to 59 of his judgment:

> "55. First, counsel for the mother had not presented her case before the judge at the hearing on the basis that the judge should exercise this *parens patriae* jurisdiction; the mother's case had been explicitly presented on the basis that the English Court's jurisdiction was to be founded either on the basis of *Article 8 BIIR* or *Article 10 B* …
>
> 56. Consistent with the way in which the case was presented before the judge at first instance, the appellant's case on this appeal was originally presented on the basis that the 'legal framework' was limited to a consideration of *Article 8* and *Article 10* of *BIIR*. It seems to me that the appellant is in very considerable difficulties in arguing that the judge was wrong not to accept jurisdiction on a basis which was not argued before her.
>
> 57. Secondly, and in any event, a *parens patriae* jurisdiction founded on the basis of nationality is a relative rarity."

Cobb J then cited dicta from the Justices of the Supreme Court in ***Re B***, supra, (considered below). He continued:

> "58. Thirdly, the court's reliance on, or deployment of, the inherent jurisdiction is highly discretionary. It would in the circumstances be very difficult indeed for the appellant mother to persuade us that the judge was wrong not to exercise her discretion to invoke this jurisdiction in the absence of some error of principle or misunderstanding of the facts; this is particularly so (although I realise that this is repeating the first point above), as the case had not been argued before the judge at first instance in this way.
>
> 59. Even if we had decided that the mother should be allowed to rely on this further ground of appeal, then for the reasons outlined above, I would have had no hesitation in concluding that this ground would not have added materially to the merits of the appeal, or affect the ultimate outcome."

8. With regard to the grounds for appeal for which permission had been granted, the appeal was dismissed, for the reasons set out in Cobb J's judgment at paragraphs 60 to 84. It is unnecessary to recite those reasons for the purposes of the current appeal.

9. On 17 August 2020, the mother, who had changed solicitors, filed two applications, one in Form C66 (applicable for starting proceedings under the inherent jurisdiction) and the other in Form C2 (applicable for seeking an order in current proceedings). In the former, in the box asking her to set out what she was applying for, her solicitor wrote:

> "For the Court to continue to hear the case on the basis of an application to exercise its inherent jurisdiction, but to do so in pursuance of parens patriae, on the basis of the children's nationality and because the children's situation requires their immediate protection by the High Court (apropos Re B (A Child) (Habitual Residence: Inherent Jurisdiction) [2016] UKSC 4)."

In the equivalent box in the latter application, her solicitor wrote:

> "For the Court to set aside the order of HHJ Hiller sitting as Judge of the High Court on 28th October 2019 (case number FD18P00811).
>
> The Mother relies upon FPR 2010, Rule 12.52A and ***B (A Child) (Abduction: Article 13(b))*** [2020] EWCA Civ 1057. The Mother asserts there has been a fundamental change of circumstances which undermines the basis on which the original order was made, as now incorporated in FPR 2010, PD12F, para 4.1A, and in addition facts not properly considered by the Court at first instance that were presumably not considered by mistake."

In the event, the court office declined to issue the first application as the previous wardship proceedings had not been dismissed. But the mother's solicitor made it clear in a statement that his client was seeking to make two applications (1) for an order setting aside the non-return order and (2) for the court to continue to hear the case under the *parens patriae* jurisdiction on the basis of the children's nationality and because their situation required their immediate protection.

10. The application in C2 and supporting statement were served on the father by email and the matter listed for a case management hearing before Mostyn J on 22 September. At the hearing, the judge decided that the set aside application should be determined first. He delivered an ex tempore judgment giving his reasons for this decision. That has not been transcribed but in his later judgment he explained that it seemed to him "illogical and conceptually challenging for the court to consider making a return order while there remained on the file a valid, undischarged order refusing that very relief." He added that he had expressed the view that the mother was "likely to face at trial an argument that she had been guilty of ***Henderson*** abuse," referring to the principle, derived originally from ***Henderson v Henderson*** (1843) Hare 100, that a court has the power to strike out proceedings as an abuse of process in circumstances where the issues sought to be raised might have been dealt with in earlier proceedings. He listed the application to set aside for a hearing before himself on 14 and 15 December 2020 and gave directions for the mother to file a statement setting out, inter alia:

> "(a) what she asserts to be the relevant change in circumstances since the family's consensual relocation to Libya and is to set out those changed circumstances in schedule form identifying the factual evidence in support of same;
>
> (b) the current state of the justice and geo-political systems currently pertaining in Libya;

> (c) an explanation as to why she did not seek to argue that there should be a full welfare enquiry and/or consideration of orders pursuant to the inherent (*parens patriae*) jurisdiction when the case was heard by HHJ Hillier in September and October 2019;
>
> (d) why she asserts that the changed circumstances, as alleged by her, should lead to the court exercising its inherent (*parens patriae*) jurisdiction."

The mother complied with that direction and the father filed a statement in response.

11. The mother exhibited to her statement a report from Dr Igor Cherstich, an anthropologist with wide-ranging knowledge of Libya. She had not sought permission under Part 25 of the Family Procedure Rules to file any expert evidence, but in the event the judge allowed her to rely on the report. Dr Cherstich's opinion was summarised at the end of his report, and cited by the judge, as follows:

> "(a) Libya is in state of war.
>
> (b) There is widespread and unpredictable violence throughout the country, and if the children remain in Libya they would, solely on account on their presence there, face a real risk of being subject to violence.
>
> (c) If the children remain in Libya, they will not be able to live a functional life, access healthcare or pursue an education.
>
> (d) In the context of a potential litigation between the mother and the father, it is likely that the mother will not be able to access the Libyan justice system.
>
> (e) In the context of a potential litigation between the mother and the father, it is likely that any application brought by the mother or on her behalf in relation to the children will not be considered fairly.
>
> (f) The three governments operating in Libya are unable to ensure that the children's human rights are respected."

In his statement in response, the father asserted that Dr Cherstich's report described the general situation in Libya rather than the specific circumstances of the children which he portrayed as unremarkable and normal as demonstrated in photographs exhibited to his statement, that the situation had not deteriorated since 2017 when the mother had been content for the children to live there, and that contrary to the mother's assertion, she would be able to litigate fairly.

12. In his skeleton argument on behalf of the mother for the hearing before the judge, Mr William Tyler QC stated that the mother was applying (a) for Judge Hillier's order to be set aside and (b) "both dependent on that application and separately, for the court to hear her application pursuant to its inherent jurisdiction (deriving from the *parens patriae* nationality-based jurisdiction) in order to ensure the children's safety and

welfare." He based his application to set aside on two grounds (1) that there had been change of circumstances and (2) that the children's welfare required it. In addition, he argued, independently of the set aside application, that the *parens patriae* jurisdiction should be exercised because the children required the court's protection. On behalf of the father, Ms Cliona Papazian invited the court to dismiss the application to set aside on both grounds advanced, asserting that there had not been a fundamental change of circumstances and that the children's welfare did not require that the order be set aside. With regard to the further application under the *parens patriae* jurisdiction, she contended that the high threshold for the exercise of the jurisdiction had not been reached.

13. The hearing duly took place in December 2020 as directed. Much of the argument centred around the topic of *Henderson* abuse. At the conclusion of the hearing, judgment was reserved. On 11 January 2021, judgment was handed down dismissing the mother's application dated 17 August 2020 and her earlier wardship application made on 30 November 2018, and ordering that the children should cease to be wards of court.

The law

14. The interesting history of the inherent *parens patriae* jurisdiction has been considered in a number of cases and learned works. It is unnecessary to retrace that history again in this judgment. The legal principles governing the exercise of the p*arens patriae* jurisdiction to order the return of a child to this country has been considered by the Supreme Court in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] AC 1 and again in *Re B (A Child)* [2016] UKSC 4, [2016] AC 606. This Court had considered the principles in the latter case reported as *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)* [2015] EWCA Civ 886, [2016] AC 606 and has done so more recently in *Re M (A Child)* [2020] EWCA Civ 922, [2020] 3 WLR 1175. In the last-named case, at paragraphs 43 to 109, Moylan LJ carried out an extensive review of the relevant case law. As a result, no further lengthy exegesis is required.

15. The Family Law Act 1986 restricts the making of orders giving care of, or contact with, a child to cases where the court has jurisdiction under Council Regulation 2201/2003 or the Hague Convention 1996 or, if not, where the child is (a) habitually resident in England and Wales, or (b) present in England and Wales and either (i) is not habitually resident in any part of the United Kingdom or (ii) the court considers that the immediate exercise of its powers is necessary for his protection: sections 1(1)(d), 2(3) and 3. In *A v A*, the Supreme Court held that the restrictions on the use of the *parens patriae* jurisdiction in the 1986 Act do not exclude its use so as to order the return of a British child to this country. Whilst endorsing the warning given by Thorpe LJ in *Al Habtoor v Fotheringham* [2001] 1 FLR 951 that there were reasons for "extreme circumspection" in exercising the jurisdiction, the Supreme Court observed (at paragraph 65) that "all must depend on the circumstances of the particular case". In *Re B*, the Justices of the Supreme Court made a number of further observations, all of which were obiter. In *Re M*, however, the use of the inherent jurisdiction to order the return of a British national child was the issue arising on the appeal. It was in that context that Moylan LJ carried out his extensive review referred to above. His conclusions are set out at paragraphs 104 to 108:

"104. I understand why, given the wide potential circumstances, concern was expressed in *In re B* that the exercise of the jurisdiction should not necessarily be confined to the "extreme end" or to circumstances which are "dire and exceptional". But I do not consider that this means that there is no test or guide other than that the use of the jurisdiction must be approached with "great caution and circumspection". The difficulty with this as a test was demonstrated by the difficulty counsel in this case had in describing how it might operate in practice.

105. In my view, following the obiter observations in *In re B*, whilst the exercise of the inherent jurisdiction when the child is habitually resident outside the United Kingdom is not confined to the "dire and exceptional" or the "very extreme end of the spectrum", there must be circumstances which are sufficiently compelling to *require* or make it *necessary* that the court should exercise its protective jurisdiction. If the circumstances are sufficiently compelling then the exercise of the jurisdiction can be justified as being required or necessary, using those words as having, broadly, the meanings referred to above.

106. In my view the need for such a substantive threshold is also supported by the consequences if there was a lower threshold and the jurisdiction could be exercised more broadly; say, for example, whenever the court considered that this would be in a child's interests. It would, again, be difficult to see how this would be consistent with the need to "approach the use of the jurisdiction with great caution or circumspection", at [59]. It is not just a matter of procedural caution; the need to use great caution must have some substantive content. In this context, I have already explained why I consider that the three reasons set out in *In re B* would not provide a substantive test and, in practice, would not result in great circumspection being exercised.

107. The final factor, which in my view supports the existence of a substantive threshold, is that the 1986 Act prohibits the inherent jurisdiction being used to give care of a child to any person or provide for contact. It is also relevant that it limits the circumstances in which the court can make a s.8 order. Given the wide range of orders covered by these provisions, a low threshold to the exercise of the inherent jurisdiction would increase the prospect of the court making orders which would, in effect, "cut across the statutory scheme" as suggested by Lord Sumption in *In re B*, at [85]. This can, of course, apply whenever the jurisdiction is exercised but, in my view, it provides an additional reason for limiting the exercise of the jurisdiction to compelling circumstances. As Henderson LJ observed during the hearing, the statutory limitations support the

> conclusion that the inherent jurisdiction, while not being wholly excluded, has been confined to a supporting, residual role.
>
> 108. In summary, therefore, the court demonstrates that it has been circumspect (to repeat, as a substantive and not merely a procedural question) by exercising the jurisdiction only when the circumstances are sufficiently compelling….."

16. In ***Re M***, the judge at first instance had made an order under the inherent jurisdiction for the return of a British national from Algeria, a non-Hague Convention country, where she was habitually resident so that, as recited in the order, "an assessment can be made in a place of safety as to her best interests and living arrangements". This Court allowed an appeal from the order on several grounds, including that, as had been made clear by the recital and other provisions dealing with the child's care, the court was embarking on a welfare inquiry which would include making orders about arrangements for her care, an order which conflicted with the 1986 Act. In Moylan LJ's view (paragraph 137):

> "this would be using the inherent jurisdiction directly for the purpose of avoiding the effect of the 1986 Act and would, in the circumstances of this case, improperly have subverted Parliament's intention …. I deliberately say, in the circumstances of this case, because I can see that there may well not be a bright line between an order which conflicts with the limitations imposed by the 1986 Act and one which does not. In my view, it would be doing so in this case because the judge's order was expressly for the purpose of enabling this court to decide who should care for A and whether here or in Algeria."

17. The provisions now in the Family Procedure Rules and associated Practice Directions governing applications to set aside orders under the inherent jurisdiction were introduced in April 2020 following the decision of this Court in ***Re W (Abduction: Setting Aside Return Order)*** [2018] EWCA Civ 1904. In his judgment in that case, Moylan LJ, having analysed the previous case law, concluded (at paragraph 66):

> "my provisional view is that the High Court has power under the inherent jurisdiction to review and set aside a final order under the 1980 Hague Convention. This power can be exercised when there has been a fundamental change of circumstances which undermines the basis on which the original order was made."

For reasons explained in his judgment, by the time of the hearing of the appeal in that case, the issue had become academic, so his observations were obiter. At the end of the judgment, Moylan LJ stated that he would refer the matter to the Family Procedure Rules Committee. After a consultation process, the committee proposed amendments which went further than anticipated following the decision in ***Re W***. Two new rules were introduced – one (FPR 12.42B) dealing with applications to set aside orders under the inherent jurisdiction generally and the other (FPR 12.51A) dealing with applications to set aside orders for the return or non-return of a child under the Hague Convention. Under FPR 12.42B(2), a party may apply to set aside an inherent jurisdiction order where no error of the court is alleged. These new rules were accompanied by

amendments to two Practice Directions – PD12D, "Inherent Jurisdiction (including Wardship) Proceedings", and PD12F, "International Child Abduction". Whereas the new rules were separate, however, there was some overlap between the two Practice Directions because PD12F dealt with applications for the summary return of children not only under the Convention but also under the inherent jurisdiction. In addition, the grounds on which a court could set aside an order were extended to include a number of factors in addition to "fundamental change of circumstances", including (in cases under the inherent jurisdiction) where "the welfare of the child requires it".

18. The relevant provision in PD12D is paragraph 8.4:

> "An application to set aside an inherent jurisdiction order should only be made where no error of the court is alleged (unless the circumstances set out in rule 18.11 apply). If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which an inherent jurisdiction order may be set aside are and will remain a matter for decisions by judges. The grounds may include: (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a fundamental change in circumstances which undermines the basis on which the order was made; and (v) the welfare of the child requires it."

19. The relevant provision in PD12F is paragraph 4.1A:

> "If you are a party to a return case and you believe that the court has made an error, it is possible to apply for permission to appeal (see Part 30 of the Rules and Practice Direction 30A).
>
> In rare circumstances, the court might also 'set aside' its own order where it has not made an error but where new information comes to light which fundamentally changes the basis on which the order was made. The threshold for the court to set aside its decision is high, and evidence will be required – not just assertions or allegations.
>
> If the return order or non-return order was made under the 1980 Hague Convention, the court might set aside its decision where there has been fraud, material non-disclosure or mistake (which all essentially mean that there was information that the court needed to know in order to make its decision, but was not told), or where there has been a fundamental change in circumstances which undermines the basis on which the order was made. If you have evidence of such circumstances and wish to apply to the court to set aside its decision, you should use the procedure in Part 18 of the Rules.
>
> If the return order or non-return order was made under the inherent jurisdiction (see Part 3 of this Practice Direction), the court might set aside its decision for similar reasons as with return-non-return orders under the 1980 Hague Convention, but

> it also might set aside its decision because the welfare of the child or children requires it. If you have evidence of such circumstances and wish to apply to the court to set aside its decision, you should use the procedure in Part 18 of the Rules. Any such application should be made promptly and the court will also aim to deal with the application as expeditiously as possible."

The fact that the child's welfare is a ground for setting aside a return or non-return order under the inherent jurisdiction but not under the Hague Convention reflects the fact that the former is a jurisdiction in which welfare is paramount whereas the latter is not.

20. In ***Re B (A Child) (Abduction: Article 13(b))*** [2020] EWCA Civ 1057, this Court (Moylan LJ, Peter Jackson LJ and Carr LJ) allowed an appeal against an order refusing to set aside a return order under the Hague Convention. This was the first such appeal that had reached this Court after the implementation of the amended rules and Practice Directions. At paragraph 83, Moylan LJ noted:

> "In ***Re W*** I proposed, what I described as, a "high" bar when the court is determining an application to set aside an order under the 1980 Convention, namely (I repeat) "a fundamental change of circumstances which undermines the basis on which the original order was made". This approach has been adopted, as part of the changes to the FPR 2010, in PD12F paragraph 4.1A…. That this approach has been adopted by the Family Procedure Rules Committee, fortifies my view that this is the right test when the court is deciding whether to set aside an order."

In making that observation, Moylan LJ was referring to applications to set aside orders made under the Hague Convention, rather than the inherent jurisdiction, under which, as mentioned above, the grounds on which an order can be set aside include not merely a fundamental change of circumstances but also where the child's welfare requires it.

21. Moylan LJ stressed (at paragraph 82) that in his observations at paragraph 66 in ***Re W*** he had been only dealing with the set aside application, not with the approach the court should take at any consequent rehearing. At paragraph 89, he suggested the following approach to dealing with an application to set aside an order under the Convention:

> "(a) the court will first decide whether to permit any reconsideration;
>
> (b) if it does, it will decide the extent of any further evidence;
>
> (c) the court will next decide whether to set aside the existing order;
>
> (d) if the order is set aside, the court will redetermine the substantive application."

He continued:

> "90. Having regard to the need for applications under the 1980 Convention to be determined expeditiously, it is clearly important that the fact that there are a number of distinct issues which the court must resolve does not unduly prolong the process. Indeed, it may be possible, when the developments or changes relied upon are clear and already evidenced, for all four stages to be addressed at one hearing. More typically, I would expect there to be a preliminary hearing when the court decides the issues under (a) and (b), followed by a hearing at which it determines the issues under (c) and (d). These will, inevitably, be case management decisions tailored to the circumstances of the specific case."

The judgment under appeal

22. The judgment started with a summary of the background and the history of the proceedings. The judge reiterated his view, reflected in the case management order made previously, that the set aside application should be the lead application. Referring to the judgment in this Court dismissing the appeal from Judge Hillier, and in particular to the observations made by Cobb J for refusing the mother permission to amend her grounds of appeal to rely on the *parens patriae* jurisdiction, Mostyn J said, (at paragraph 18):

> "I do not think that Cobb J was saying, on the facts of the case before him, that the *parens patriae* jurisdiction could not be used to protect the children. Put another way, I do not think that I am impeded by the Court of Appeal decision from considering whether the jurisdiction should be exercised."

He then continued with a summary of the evidence, including the report of Dr Cherstich and the father's response.

23. At paragraph 40, the judge embarked on his analysis of the law. He noted that the power to set aside an order under the inherent jurisdiction is contained in FPR 12.42B, supplemented by PD 12D paragraphs 8.1 to 8.6 and PD 12F paragraph 4.1. He noted under paragraph 8.4 of PD 12D that:

> "The grounds on which an inherent jurisdiction order may be set aside are and will remain a matter for decisions by judges. The grounds may include: (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a fundamental change in circumstances which undermines the basis on which the order was made; and (v) the welfare of the child requires it."

Having cited further from the two Practice Directions, he observed (at paragraphs 41 to 42:

> "41. Thus, the procedure prescribed by these Practice Directions is that the court may first consider whether the application is either unarguable or otherwise abusive and if so

> dispose of it then and there. If it survives this preliminary sift the court will give the necessary directions for evidence and set the case down for trial. At trial the court will determine the application and, if it is successful, will go on to determine anew the original application. Such a two-part process is routine for all kinds of applications. It happened in this case although it was not pressed on me at the directions hearing that the application to set aside HHJ Hillier's order should be summarily dismissed or struck out. This bifurcated process is also suggested in some obiter observations by Moylan LJ in ***Re B (A Child) (Abduction: Article 13(b))*** [2020] EWCA Civ 1057 at [89 – [90].
>
> 42. As for the grounds for a set-aside it is my opinion, consistently with my decision in the financial remedy case of ***CB v EB*** [2020] EWFC 72, that there is no scope for expanding the list of potential grounds mentioned in PD 12D para 8.4. Moreover, the final ground namely "the welfare of the child requires it" cannot be interpreted literally to allow repeated further bites at the cherry on the mere assertion that a new welfare analysis militates in favour of a different order. In my opinion the welfare ground should be aligned with the change-of-circumstances ground. There must have been such a fundamental change in circumstances that the welfare analysis is completely undermined, and a fresh analysis of the child's welfare demands a different disposition. Any other approach is to encourage duplicative litigation and to defeat finality, which is contrary to the public interest."

24. At that point in the judgment (paragraphs 43 to 55), the judge embarked on an exegesis on the principle of ***Henderson*** abuse. He distinguished it from the substantive law doctrine of *res judicata* and cause of action estoppel and identified it as arising in two circumstances (1) where a party seeks to mount a collateral attack on a final decision of a court of competent jurisdiction and (2) if it can be shown that the claim now made should have been raised in the earlier proceedings. In the latter circumstances, he stated (at paragraph 52):

> "there is imposed on a litigant a requirement to show that she could not with reasonable diligence have brought forward the subject matter, or key ingredients, of the second case first time round."

He cited in support his earlier decision in ***GM v KZ (No. 2)*** [2018] EWFC 6, [2018] 2 FLR 469, 2 paragraphs 10 to 12. He noted, however, that the due diligence principle is applied in children cases with a degree of flexibility, and cited in support dicta of Waite LJ in ***Re S (Discharge of Care Order)*** [1995] 2 FLR 639. He continued:

> "54. … In this case the mother did not raise *parens patriae* first time round, or at least not soon enough. The first case lasted for 17 months from November 2018 to April 2020. This case has lasted for 4 months since its initiation in August 2020. It is hard not to draw the conclusion that the father is being

> unjustly harassed. The mother's explanation for the failure to advance her present argument is simply that she was not advised to raise it by her lawyers.
>
> 55. If this were a case about money I would readily conclude that the failure to advance the case first time round was not justified and that therefore the current case is an abuse which should be stopped. However this is not a case about money and my conclusion on the facts of this case is that the unjustified failure to advance this claim first time round should be brought into the equation as part of the overall discretionary exercise as to whether the jurisdiction should be exercised, rather than as a preliminary reason to stop the case without further consideration of the wider question. I am not saying that this should be the rule in all children's cases; there may well be cases where ***Henderson*** abuse, if proved, should stop the case preliminarily. However, on the facts of this case it would not be just, in my judgement, to stop the case now without consideration of the scope and purpose of the *parens patriae* jurisdiction and whether it should be exercised in this case …."

25. The judge then considered the legal principles relating to the *parens patriae* jurisdiction, drawing in particular on a lecture given by Sir James Munby, previously President of the Family Division, to the Court of Protection Bar Association on 10 December 2020: "Whither the inherent jurisdiction? How did we get here? Where are we now? Where are we going?" He quoted observations from the judgments in ***Re B (A Child)*** [2016] UKSC 4, [2016] AC 606 (all of which were, as he noted, obiter) and from the judgment of Moylan LJ in ***Re M*** supra. This led him to observe (at paragraph 67) that "lying behind these principles are two big questions". He continued:

> "First, can this court's order actually protect these British children? This gives rise to the question of the enforceability in the other country of any order that this court might make."

Having cited a passage from paragraph 56 of the judgment of this Court in ***Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)*** [2015] EWCA Civ 886, [2016] AC 606, the judge observed:

> "This passage suggests that a factor, maybe a critical factor, at large when deciding to make a protective order is the likelihood of successful enforcement of the order by the other country's legal system in the event that the actor with the care of the children refused to comply with it."

Having cited a passage from the judgment of Sir James Munby P in ***Re Jones (No 2)*** [2013] EWHC 2730 (Fam) at paragraph 15, he added:

> "generally speaking, the court will not undertake an analysis of the subjective intentions of the respondent regarding compliance. I am not suggesting, of course, that such an analysis

> is impermissible, or that conclusions reached are inadmissible. Rather, I am suggesting that if this course is taken it is a distinctly secondary exercise."

26. This led the judge to consider what he described as the second big question:

> "What can this court do when the children are living in a place where normal civil society has broken down?"

He observed that, in the case of ***Re KR (Abduction: Forcible Removal by Parents)*** [1999] 2 FLR 542, in which Singer J had exercised the *parens patriae* jurisdiction to find and rescue a child abducted to India for the purposes of forced marriage, the judge had been able to draw on the assistance of the Indian authorities and the British High Commission. He observed that it was doubtful that the order would have been made if there was anarchy in the country because "it would have been a futile order." After a further quotation from Sir James's lecture, he stated (at paragraph 74):

> "It is my clear judgment that where the court is exercising this exorbitant extraterritorial jurisdiction, it has to make first and foremost an assessment of the likelihood of reciprocal enforcement of its order in an overseas court. The court will need to be satisfied, therefore, before it makes an order for protection – and realistically the order will be almost invariably be an order which facilitates repatriation – that in the event of non-compliance by the actor with the care of the children there is a reasonable prospect of the authorities of that country enforcing the order."

27. The judge then (at paragraph 75) set out his conclusion on the application before him:

> "I approach my task with great caution and circumspection. My conclusion is that the mother does not surmount the substantive (which I take to mean "high") threshold for the making of a protective order in respect of these children. I cannot conclude that the circumstances are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction. I now give my reasons."

28. He considered first "whether a protective order for repatriation, if made, would be likely to be capable of enforcement in the Libyan courts at the suit of the mother." Having considered Dr Cherstich's evidence, to the effect that the rule of law was "practically absent" in Libya, that women were discriminated against there and that it was likely any application brought by the mother about the children would not be treated fairly, he held (at paragraph 78):

> "The evidence is clear. The mother would be unlikely to be able to enforce an order for repatriation in the courts of Libya, even assuming that they were functioning. Therefore, an order for repatriation which seeks the assistance of the Libyan authorities in its facilitation would be a *brutum fulmen*, or an exercise in futility."

Whilst not entirely dismissing the suggestion that he could make an order and see if the father complied on the grounds, the judge expressed doubt about such a course, adding that:

> "an assessment of the likelihood of compliance by the father with an order for repatriation is not the ultimately determinative consideration in assessing whether the order, if extending to the Libyan authorities, would be futile."

29. He then turned to the question of change of circumstances. On this point, he found (at paragraph 82):

> "I am not satisfied that since the order of HHJ Hillier on 25 October 2019 there has been a fundamental change of circumstances undermining the basis on which her order was made, justifying its setting aside or that the welfare of the children demands it. On the contrary, it seems to me, while the situation in Libya is concerning, that things have not got worse and that it could be said that things have slightly improved since that date."

30. Having identified those "two primary reasons" for refusing the application, he added two further reasons (paragraph 84):

> "(i) Although the mother has carefully framed her application in terms of protection, the stark reality is, just as it was in ***Re B***, that as soon as the children arrived here (if they ever did) she would apply for residence with, or contact to, them. This means that the inherent jurisdiction is sought to be used to circumvent principled limitations which Parliament has placed upon the jurisdiction of the court. This would not be a proper exercise of the court's power.
>
> (ii) … the inherent jurisdiction, while not being wholly excluded, has been confined to a supporting, residual role…[T]he mother seeks the jurisdiction to be used as the primary, indeed sole, form of relief. Again, this would not be a proper exercise of the court's powers."

31. At paragraph 85, he added:

> "An additional reason (on which my primary conclusion does not depend) is that the mother has been guilty of *Henderson* abuse. She could and should have raised her *parens patriae* arguments before HHJ Hillier. The failure of her previous lawyers to advise her to place this argument before HHJ Hillier does not justify the default. For the father to have been forced to endure, if not an identical claim, then one that is strikingly similar, only four months after the conclusion of the first claim does amount, in my judgment, to unjust harassment."

32. The judge then dismissed the mother's application dated 17 August 2020 and her originating wardship application dated 30 November 2018. He concluded by urging the father to allow the mother to have "meaningful contact" with the children.

Submissions to this Court

33. On behalf of the mother, Mr Tyler, leading Ms Emily James, submitted, first, that the judge wrongly interpreted and applied the rules in relation to the setting aside of an order under the inherent jurisdiction and in particular failed to consider whether the children's welfare required the non-return order to be set aside. The general grounds on which an order under the inherent jurisdiction can be set aside under PD 12D paragraph 8.4 and the specific grounds a non-return order under the inherent jurisdiction can be set aside under PD 12F paragraph 4.1 are the same - fraud, material non-disclosure, certain types of mistake, a fundamental change in circumstances, and where the welfare of the child requires it. Mr Tyler submitted that the judge had been wrong in paragraph 42 of his judgment to align the welfare ground with the change-of-circumstances ground. There is no basis for such an interpretation within the Practice Direction. In both PD12D and PD12F, welfare is a separate ground for setting aside.

34. Mr Tyler adds that, in the current case, the judge's analysis is doubly wrong. How would it be possible for there to be "such a fundamental change in circumstances that the welfare analysis is completely undermined" when there has been no welfare analysis in the first place in either set of proceedings? The effect of the judge's mistaken analysis of the law was to remove entirely from the judicial reasoning any consideration of whether the welfare of the children required the order to be set aside when that was a central plank of the mother's case.

35. Although the judge had declared at the case management hearing that the set aside application should be determined first, the mother had also made a fresh application for a return order under the *parens patriae* jurisdiction. In both applications, the mother asserted, with the support of expert evidence, that the children were in danger. The judge's assessment of this issue was confined to his observation that he was not satisfied that there had been a fundamental change of the circumstances in which Judge Hillier's order had been made so as to justify setting it aside, or that the children's welfare demanded it. He added that, on the contrary, the situation in Libya had not got worse and if anything could be said to have slightly improved. Mr Tyler submitted that these brief observations came nowhere near meeting the requirement for an assessment of the children's welfare or their need for protection.

36. Next, Mr Tyler submitted that in the exercise of his discretion whether to make an order, the judge gave undue weight to the likelihood that such an order would not be directly and reciprocally enforced in the other country. Mr Tyler focused his submissions on paragraph 74 of the judgment which he submitted contained a number of errors. In particular, it was wrong to say that the court "has to make first and foremost an assessment of the likelihood of reciprocal enforcement". Mr Tyler submitted that the primary assessment must surely be the children's welfare and need for protection, how best to promote their welfare and meet that need. In support of this submission, Mr Tyler cited the so-called radicalisation cases in which the courts have been willing to exercise the wardship jurisdiction based on nationality in respect of children who are outside the jurisdiction and living in parts of Syria which were at that stage under the control of the self-proclaimed Caliphate where there was no prospect of the wardship

orders being enforced: ***Re M (Wardship: Jurisdiction and Powers)*** [2015] EWHC 1433, [2016] 1 FLR 1055. To that end, any number of orders might be made, and the assistance of any number of other persons or organisations might be enlisted by the court. That would involve an assessment of the likelihood of the person or persons against whom orders are being made complying with them and, in addition, any means of enforcing compliance. It is the latter point which involves an assessment of the likelihood of reciprocal enforcement alongside an assessment of other means of achieving compliance such as sequestration, arrest warrants and so on. An order which may be acted on by the person to whom it is directed cannot be described as "futile" even if it would not be directly enforceable in a foreign court. Mr Tyler pointed to the fact that the father is a British citizen and a practising lawyer. He has participated in and complied with two sets of proceedings in this jurisdiction. At no point has he indicated that he would not comply. In those circumstances an order made in these proceedings could not be described as futile simply because the Libyan courts may not be prevailed upon to enforce it.

37. Having challenged the judge's two primary reasons for dismissing the mother's application, Mr Tyler turned to the subsidiary reasons in paragraphs 84 and 85 of the judgment. He acknowledged the concern that an order for the return of the children would have the effect, on compliance, of re-creating a substantive Children Act jurisdiction based on presence under s.3 of the Family Law Act 1986 and could therefore be seen as "cutting across the statutory scheme" and that Moylan LJ in ***Re M*** had identified this as an additional reason for limiting the exercise of the jurisdiction to compelling circumstances. Mr Tyler submitted that, whilst this was a factor supporting the constraining of the exercise of the jurisdiction to cases demonstrating compelling circumstances, it was not a reason for refusing to exercise the jurisdiction. What is required in any case is an analysis of whether the circumstances are sufficiently compelling. Secondly, the fact that Moylan LJ in ***Re M*** endorsed the proposition that the inherent jurisdiction has been confined by the statutory limitations to a supporting role does not mean that it cannot be exercised in circumstances where it would be the primary or sole form of relief. Finally, although the judge had stated that his primary conclusion did not depend on his finding that the mother had been guilty of ***Henderson*** abuse, Mr Tyler submitted that the doctrine had no place in children's proceedings. He informed us that he and Ms James had been unable to find any case under the Children Act involving welfare or in wardship in which it has even been argued, let alone judicially determined, that so-called "***Henderson***" abuse can act to defeat a claim, whether in whole or as part of a discretionary process. Accordingly, the judge had been wrong to characterise the mother's conduct as amounting to such abuse or unjust harassment of the father and wrong to take this into account when deciding to dismiss the mother's applications.

38. In reply, Mr Henry Setright QC, leading Ms Papazian who had appeared below, submitted that the judge had identified the applicable law and correctly found on the material before him that there was no basis for a set aside of the non-return order and that the mother had not established grounds for the exercise of the *parens patriae* jurisdiction. He submitted that that the correct test on set aside is encapsulated by PD12D rather than PD12F. While the list in paragraph 8.4 of PD12D is non-exhaustive and intended to be illustrative, it does require an applicant to establish one of the "qualifying grounds" to establish the gateway to the exercise of the discretion to set aside. Contrary to the mother's contention before this Court, it does not support a stand-

alone welfare enquiry. Indeed, that was not how the mother had framed her case in the court below. Instead, she had contended that there had been a fundamental change of circumstances. This was apparent from the case management directions made at the hearing in September 2020 under which she was required to identify by a schedule the basis on which she asserted a "fundamental change of circumstance". It was her case that the situation in Libya had so deteriorated since 2017 that that amounted to both a fundamental change in circumstance and established the need for protection. When it was pointed out in the course of the hearing before us that no welfare findings had been made by Judge Hillier, Mr Setright responded that, although her decision had been based on habitual residence, she had considered the evidence as to the children's circumstances and made some findings about them in the course of her judgment.

39. In the alternative, Mr Setright submits that, even if the judge's determination on set aside was flawed, his determination as to whether the mother had established the basis of the exercise of the nationality-based jurisdiction was entirely correct and consistent with the decisions of the Supreme Court in ***In re B*** and of this Court in ***Re M*** which stipulated a substantial threshold to found the exercise of the jurisdiction. Mr Setright described the judge's succinct appraisal of the evidence and conclusion as unimpeachable. He rightly was not satisfied on the facts that the mother had established a case for protection, given what appeared to be an improvement in the situation in Libya compared to 2017 at a date when, as found in the earlier proceedings, the mother had agreed to the family's relocation. Unsurprisingly, Dr Cherstich's report did not intersect with the father's assertions on the particular circumstances of the children whose actual experiences of life as members of a well provided for middle class family were very different from the general picture of life in Libya portrayed in the report. Mr Setright relied on the proposition, which he described as "unremarkable", that, whilst some children may be at risk in a country divided by civil war, others may be safe and well provided for. The mother had not sought to put any further information as to the children's circumstances before the court. While she now complained of a failure to carry out a welfare analysis, that was not how her case was put before the judge. Given the focus of her application, and the evidence put before him, the judge was entitled to conclude that the relatively high hurdle for the gateway criteria for the exercise of the *parens patriae* jurisdiction was not surmounted.

40. Mr Setright submitted that, reading the judgment as a whole, it is clear that the question of enforceability was ultimately not central to the judge's decision which was based on the mother's failure to establish a need for protection. Mr Setright added, however, that the court does not act in vain or make orders that are empty or incapable of enforcement. It was inherent in the mother's case that there are no means of enforcing a substantive English order in Libya. Furthermore, the father has no reason to return to this country and has no assets, family or connections in this jurisdiction which might provide an opportunity for enforcement. Ultimately, however, the fact that the judge considered that any order would be futile is irrelevant, given his principal finding that the mother had failed to establish her case.

41. Mr Setright described the judge's characterisation of the mother's litigation conduct as ***Henderson*** abuse as a good example of judicial vigilance against repeat applications. He relied, however, on the judge's own comment that his conclusion that the mother's litigation conduct amounted to ***Henderson*** abuse was not one on which his primary conclusion depended.

Discussion and conclusions

42. I deal first with the question of ***Henderson*** abuse. I acknowledge that judges must remain vigilant, in Mr Setright's words, to ensure that the processes and resources of the court are not abused. In my judgment, however, to import ***Henderson*** abuse into children's proceedings is neither necessary nor appropriate, for several reasons.

43. First, children's proceedings are, for the most part, quasi-inquisitorial rather than adversarial, and largely concern decisions relating to the welfare of children. Where a child's welfare is in issue, a second application to the court will rarely be capable of being simply dismissed as a "collateral attack" on the first decision. Similarly, the fact that the claim as presented on the second occasion could have been raised the first time round does not by itself absolve the court from considering it when the welfare of a child is in issue.

44. Secondly, the family court has plenty of weapons at its disposal to prevent unnecessary and inappropriate applications getting off the ground without having to add ***Henderson*** abuse to its armoury. The active case management powers in rule 1.4 of the Family Procedure Rules by which the court furthers the overriding objective in rule 1.1 include the power to decide promptly which issues need full investigation and hearing and which do not. Under rule 4.3, the court has the power to make orders of its own initiative. This Court has held that, in an appropriate case, a judge may summarily dismiss an application under the Children Act as lacking enough merit to justify pursuing the matter: ***Re C (Family Proceedings: Case Management)*** [2012] EWCA Civ 1489, [2013] 1 FLR 1089. If on considering an application the judge comes to the view that the applicant is doing nothing more than relying on evidence and repeat arguments that have already been considered, he or she will no doubt deal with the application summarily. Furthermore, under s.91(14) of the Children Act, on disposing of any application under the Act,

> " the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court."

45. Thirdly, whilst it is true that, under FPR r.4.4(1)(b), the court has the power to strike out a statement of case if it appears to be an abuse of the court's process, the rules expressly provide that this power does not extend to children's proceedings under Parts 12 to 14 of the FPR. It is to my mind significant that the rules expressly exclude the power to strike out proceedings on the ground of abuse of process in cases involving children.

46. Finally, at a more mundane level, an endorsement of the power to strike out a claim on grounds of ***Henderson*** abuse in children's cases would be to open the door to a raft of satellite litigation in which the resources of the parties and the court would be unnecessarily expended on arguments as to whether the case fell within the scope of the power. This is illustrated by the present case in which the discussion of ***Henderson*** abuse seems to have taken up a considerable amount of time in the hearing and in the judgment. There is a danger that such discussion may distract the court from the real issues in the case.

47. Of greater significance to the outcome of the present appeal, however, is the judge's interpretation of the substantive applications before him. In my judgment, and with respect to the judge, he misinterpreted the rules relating to the setting aside of orders under the inherent jurisdiction. In addition, he failed to deal adequately with the mother's additional application, advanced independently of the set aside application, asking the court to exercise its *parens patriae* jurisdiction.

48. Both PD12D and PD12F identify five separate grounds for setting aside orders under the inherent jurisdiction. Each list expressly includes amongst the grounds for setting aside that "the welfare of the child requires it". In the case of PD12F, this is an important distinction between return and non-return orders under the inherent jurisdiction and such orders made under the Hague Convention. There is no basis in the rules for the judge's approach of aligning the welfare ground with the change-of-circumstances ground. No doubt in some cases the arguments advanced about the children's welfare will amount to a change of circumstances since the original order. But to insist on an alignment between the two grounds and that there must be "such a fundamental change in the circumstances that the welfare analysis is completely undermined" is, in my view, a misinterpretation of the Practice Directions.

49. Furthermore, in the present case, no welfare analysis was undertaken by the court in the earlier proceedings because Judge Hillier concluded that the children were habitually resident in Libya and as a result the court had no jurisdiction to undertake such analysis. Mostyn J's brief observations in paragraph 82 in which he concluded that there had not been "a fundamental change of circumstances undermining the basis on which her order was made" were, with respect to the judge, a misreading of the case. The decision not to order the return of the children was made on the basis of their habitual residence in Libya, not on any assessment of welfare. The incidental findings made by Judge Hillier in the course of her judgment do not, in my view, amount to a welfare analysis.

50. The consequence of the judge's misinterpretation as to the effect of the FPR and of his apparently mistakenly considering that the previous order was based on a welfare analysis is, as Mr Tyler submitted, that one of the judge's primary reasons for dismissing the mother's applications, set out in paragraph 82, is unsustainable. In the circumstances of this case, the application to set aside was not confined, as the judge considered, to a fundamental change of circumstances. Nor, to repeat, had there been any prior substantive welfare analysis. I deal further below with whether it was necessary at all to set the previous order aside.

51. In addition, I would respectfully disagree with the judge's observation that "where the court is exercising this exorbitant extraterritorial jurisdiction, it has to make first and foremost an assessment of the likelihood of reciprocal enforcement of its order in an overseas court". As a preliminary point, I observe that the pejorative word "exorbitant" (used originally, I believe, by Thorpe LJ in ***Al Habtoor v Fotheringham***, supra, and then by Lord Sumption in his dissenting judgment in ***In re B***) does not represent the prevailing view about the jurisdiction held by the Supreme Court and this Court. More substantially, as the so-called radicalisation cases make clear, the "first and foremost" assessment which the court required to carry out is not the enforceability of its order but the welfare of the children. It is only after deciding what orders are required to secure the children's welfare that the court should turn to consider enforceability, and when it does consider that matter it will look first at the likelihood of the person against whom the order is made complying with the order and then the means of enforcing

compliance if he does not. There may be various means of securing compliance without resorting to reciprocal enforcement in the courts of the other country. In the present case, as Mr Tyler observed, there are several reasons why the father may be inclined to comply with an order even though it may not be enforceable in Libya. For those reasons, to describe this exercise as futile is, to my mind, not correct.

52. It follows that I disagree with the judge's two primary reasons for dismissing the mother's application. As for the further reasons identified in paragraph 84 of the judgment, whilst it is right that the court must guard against the inherent jurisdiction being improperly used to circumvent statutory limitations on the court's jurisdiction to make orders relating to the care of and contact with children, and that as a result the jurisdiction must be limited to compelling circumstances, this does not obviate the need for an assessment of the circumstances to establish whether, as the mother contends in this case, they are sufficiently compelling to require the court to exercise its protective jurisdiction. Secondly, it does not follow from the proposition that the inherent jurisdiction has been confined by the statutory limitations to a supporting role that it cannot be exercised in circumstances where it would be the primary or sole form of relief. I understand Moylan LJ's observation in ***Re M*** that its role is supporting and residual to be a general reflection on its scope, not a specific requirement that it can only be invoked to support another cause of action. Finally, as already stated, the doctrine of ***Henderson*** abuse has no place in children's proceedings. Insofar as the judge attached any weight to his finding that the mother's conduct could be so characterised, he was wrong to do so. The mother's conduct of the litigation is of course a matter which may be relevant to a decision whether to exercise the jurisdiction, but for my part I would not describe her decision to apply to set aside the non-return order by relying on a jurisdictional basis that had not been considered in the earlier proceedings as harassment of the father, particularly in the light of her concerns about the children who she has not seen for over three years and whose welfare is, as I have noted above, the first and foremost consideration.

53. For those reasons, I conclude that the judge's approach to the set aside application was flawed and that the mother's appeal against his decision to dismiss the application dated 17 August 2020 must be allowed.

54. In addition, I conclude that the judge failed to give sufficient consideration to the mother's independent application to exercise the *parens patriae* jurisdiction. At paragraph 75 of the judgment, he expressed his conclusion in terms which would suggest that he had considered and was dismissing that application. But in the following paragraphs, his reasoning all relates to his analysis of the application to set aside the earlier order, and his conclusions that an order would be futile and that there was no fundamental change of circumstances. The mother's argument that the children's welfare required exercise of the *parens patriae* jurisdiction was never independently considered. For that reason, I would also allow the appeal against the judge's dismissal of the 2018 originating application.

55. How should this matter now proceed? I propose that the case be remitted to another judge of the Family Division to determine. In my view, what needs to be determined is not the application to set aside the earlier order but, rather, the mother's independent application under the *parens patriae* jurisdiction. It does not appear to me to be necessary at all for the previous order to be set aside. The real question in this case is whether the court should make an order for the return of the children under the *parens*

> *patriae* jurisdiction. The issue for the court will be whether the circumstances are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction. That is a matter which can be determined without any reference to the question whether the earlier order should be set aside. It would, of course, be preferable, if possible, for this Court to determine whether the protective jurisdiction should be exercised, but for my part I do not think we are in a position to do so. It requires careful analysis by a judge at first instance applying the legal principles and approach summarised by Moylan LJ in ***Re M***.

LORD JUSTICE STUART-SMITH

56. I agree.

LORD JUSTICE MOYLAN

57. I also agree.