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Neutral Citation Number: [2020] EWHC 2509 (Fam)

CASE NO: FD20P00328

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF J, K and L (Children)

The Royal Courts of Justice
The Strand
London
Date: 18 September 2020

Before:

MR RICHARD HARRISON QC
Sitting as a Deputy High Court Judge

BETWEEN:

AA Applicant

and

BB Respondent

JKL (Children) (Transnational Abandonment: Interim Order)

Ms Katy Chokowry (instructed by Dawson Cornwell Solicitors) appeared on behalf of the Applicant.

Mr Amiot Vollenweider (instructed by Duncan Lewis solicitors) appeared on behalf of the Respondent

Hearing dates: 8, 9, 10 and 11 September 2020

Covid-19 Protocol: This judgment will be handed down by the judge remotely by email. The date and time for hand-down will be deemed to be 2.00 pm on 18 September 2020.

Introduction

1. These are wardship proceedings. They concern three children, a girl and two boys, to whom I shall refer in this judgment as J, K and L. The children are aged 8, 4 and 3.
2. The applicant is the children's mother ('the mother'). She is represented by Ms Katy Chokowry. The respondent is the children's father ('the father'). For the first two days of the hearing he was represented by counsel who then had to withdraw through illness; since the morning of 10 September 2020 he has been represented by Mr Amiot Vollenweider. I am grateful to all counsel for the way in which they have presented their clients' cases in the difficult circumstances which I shall describe below. I am especially grateful to Mr Vollenweider for taking over the father's case at very short notice.
3. The mother issued these proceedings on 2 June 2020 at a time when the children had been in the jurisdiction of the Islamic Republic of Pakistan ('Pakistan') for more than a year.
4. It is the father's contention that the courts of England and Wales do not have jurisdiction in respect of the children; alternatively, that they should not exercise any jurisdiction on the basis that welfare decisions should more conveniently be made by the courts in Pakistan.
5. At the heart of this case is an allegation by the mother that she and the children have been victims of transnational abandonment. This is denied by the father. His case is that the parties made a consensual decision to relocate as family to Pakistan and did so in March 2020.

This hearing

6. On 22 July 2020 Mr David Rees QC, sitting as Deputy High Court Judge, directed that the proceedings be listed for a three-day hearing commencing on 8 September 2020 to determine the following issues:

- i. Whether the court has jurisdiction in respect of the children;
 - ii. Whether this jurisdiction is the appropriate forum for matters relating to the children to be determined;
 - iii. In the event that the court has jurisdiction and this jurisdiction is the appropriate forum, whether the return of the children to this jurisdiction should be ordered.
7. He made various other directions, including for the filing of evidence by the parties, which were intended to ensure that this would be a fully effective hearing. It was envisaged by the parties and the court that at this hearing, various issues of fact – relevant to the substantive issues set out above – would be determined after hearing oral evidence from each of the parties. Directions were given for Scott Schedules to be prepared encapsulating the parties’ cases in relation to allegations they contended it was relevant for the court to determine (they were limited to five allegations each).
8. In the event, this hearing has not proceeded as was envisaged. To say that it has been beset by difficulties is an understatement. Some of the problems which occurred included a considerable amount of evidence being served very late by the father, the absence of an interpreter and the father’s barrister having to withdraw through illness when the mother was in the middle of being cross examined.
9. The difficulties to which I have referred above are trivial compared with the tragic event which occurred on the second day of the hearing. During a short break at about 3.45pm, the mother was informed that earlier in the day a child had died in a drowning accident in Pakistan. She initially understood that the deceased child was one of the parties’ children. It transpired that he was the father’s fourteen-year old nephew (‘C’). C had been living in the paternal family home in the village in Northern Pakistan where the extended families on both sides reside. The children of the parties have also been living in that home since March 2020; prior to that they were living in the maternal family home, a short distance away. I have no doubt that the children will have been close to their cousin. The news was extremely shocking and upsetting for both parties, but especially the father. Neither party felt able to continue and I stood the matter over to the start of day 3.

10. At the start of day 3, Mr Vollenweider, as well as explaining that his predecessor had had to withdraw, informed me that his client continued to be in a state of considerable distress and did not feel able to continue to participate in the hearing.
11. Mr Vollenweider applied for an adjournment. He told me, and I accept, that having only just been instructed and being without papers he was not in a position to represent his client. In answer to an enquiry from me as to the possibility of resuming the evidence on day 4 (my other listed case having gone short), he told me that he did not consider that it would be professionally proper for him to take over the cross examination started by his predecessor. I accept this, in the particular circumstances of this case, and given all of the difficulties I have described. He initially expressed some surprise that oral evidence was being heard at all, his view being that ‘cases of this type’ would normally be dealt with on submissions. On further reflection, he later submitted to me that in circumstances where the court had begun to hear oral evidence it would not be appropriate to make any determination of the issues on the basis of submissions alone.
12. Mr Vollenweider invited me to adjourn the case for 21 days. As I had previously communicated to the parties, the earliest date upon which another three day hearing could be accommodated was 11 November 2020; if for any reason this date was unsuitable the next earliest date was in December.
13. I acceded to the application for an adjournment. Put simply, I did not consider it fair to the father to proceed to make a final determination of the serious issues that arise in these proceedings in circumstances where, through no fault of his own, he could not be properly represented or participate effectively in the hearing.

The interim situation

14. My decision to adjourn the case requires me to deal with the interim situation. I consider the present situation to be one in which the children are likely to be suffering from emotional harm, in that:
 - (a) In March 2020 they experienced a sudden separation from their mother, who until that point had been their primary carer; indeed for lengthy periods of time she has cared for them in the absence of the father. The fact that, as the father alleges, the

mother may be to blame for abandoning the children does not ameliorate the situation from their perspective (indeed he refers to them in his written evidence as having been in an '*emotional state*' after she left Pakistan).

(b) Since the 7 July 2020, when the father came to England from Pakistan, they have been separated from both their parents. They are being cared for by other family members who do not have parental responsibility.

(c) Since the children's separation from the mother, the indirect contact they have had with her has been sporadic. I make no findings, without having heard from the father, about where the responsibility for this lies. During the course of her oral evidence the mother said that she has been able to speak to one out of three children on an approximately weekly basis; but not with more than one child on any given occasion of telephone contact. She also stated that the calls were frequently cut short. It was not put to her that these factual matters were incorrect. On behalf of the father, it was instead suggested that the reasons as to the unavailability of the children at various times (matters such as being in another room or eating a meal) were likely to be genuine, a point disputed by the mother. Whatever the reasons for this unsatisfactory contact, it seems to me that it is likely to be compounding the emotional harm from which the children will have suffered since being separated from the mother.

15. In the context of the matters set out at paragraph 14 (a) to (c) above, the children have now experienced the death of their cousin. They are living in a household which is likely to be consumed by grief and shock. The degree of upset felt by the father was such that he felt unable to continue with the case and wishes urgently to be reunited with his family. The level of distress felt by C's parents will inevitably be far worse; I can also imagine that C's grandparents will be feeling a terrible sense of loss, as will other members of the paternal household. I consider the children are likely to be feeling a mixture of shock, distress, confusion and fear.

16. In the present circumstances, I do not consider it tolerable for the children to continue to be separated from their parents. They need urgently to experience the love and comfort of the two most important people in their lives.

17. There is no agreement between the parties as to the interim arrangements for the children. The father's case is that they should not come to England. He should be permitted to travel to Pakistan to be with them. He offers to pay into court the sum of £5,000 as a bond to guarantee his return. The mother says that the children urgently need to be with her. She asserts that if the father is permitted to return to Pakistan it is likely that he will not come back to England and that she will not see the children again for the foreseeable future.
18. As the father disputes jurisdiction, and in view of what I consider to be the urgency of the interim issues, in my judgment it is incumbent on the court to determine the question of jurisdiction – at least provisionally - on the basis of the available material.
19. There is nothing in Council Regulation (EC) No 2201/2003 ('Brussels IIa') which prevents the court from ruling upon jurisdiction unless there has been a lengthy investigation with oral evidence. The Regulation applies across all EU Member States (except Denmark); the procedure for resolving issues of this nature will vary considerably across Member States.
20. It seems to me that in deciding the procedure to be adopted to the determination of jurisdiction on a particular set of facts, the court must be guided by the overriding objective to deal with cases justly. Dealing with a case justly includes, so far as practicable (and so far as is material to the present situation):
 - (a) Ensuring that it is dealt with expeditiously and fairly;
 - (b) Dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
 - (c) Ensuring that the parties are on an equal footing.
21. For the reasons set out above I consider that it is imperative that I should determine at this stage whether I have jurisdiction to make an interim order. I consider that I can do so fairly on the basis of the considerable volume of written material before me. I regard

the situation as being very urgent; one in which the children require immediate protection. I have done my best to ensure that the parties are on an equal footing. On day 3 of the hearing, I informed counsel of my decision that I would resolve the question of jurisdiction on the basis of the papers. I gave Mr Vollenweider the opportunity to make submissions to me in writing by 11am the following morning and provided for Ms Chokowry to be able to reply briefly by 12 noon. I received a message from Mr Vollenweider this morning that, on instructions from his client, he had opted not to send further submissions to me as the document he had prepared in draft '*would reveal too many cross examination points*'.

Background

22. The father was born in Pakistan on 19 November 1978 and is aged 41 years. The mother was born, also in Pakistan, on 13 June 1992; she is aged 28.
23. The father and the mother are second cousins (the maternal grandfather and the paternal grandmother are first cousins). The wider family on both sides live in a village in the north of Pakistan. The respective maternal and paternal homes are a very short distance apart¹.
24. The mother is the oldest of seven siblings. She attended school in Pakistan between the ages of five and seventeen, when she left school without any formal qualifications. She did not learn English at school.
25. Although the father was born in Pakistan, at some point he moved to England and acquired UK nationality. He came to live in Leeds where he worked as a mini cab driver. He is obviously an enterprising person. At one point he owned and ran a grocery store.
26. It is common ground that the parties' marriage was an arranged marriage. It was first suggested that the parties should marry when the mother was aged either seventeen or eighteen and the father was in his early thirties. There is some disagreement between the parties as to the circumstances in which the marriage came to be arranged, but in any

¹ The father says within a hundred yards;

event they were married on 9 September 2011. This was the mother's first marriage and the father's second.

27. The mother's case is that the marriage was contracted on the understanding that the father was living in England where he had a job, and that she would join him in England as his wife. In the event it took some three to four years before that understanding came to be fulfilled.
28. Following the marriage as, according to the father, '*is normal practice in our culture*', the mother moved to live with the extended paternal family. From the account given by the father it would appear that the mother was significantly unhappy in the marriage almost from the outset. He says that he recognised that she was much younger than him in age and that he tried his best to keep her happy. According to his first statement, '*[f]rom the early days in our marriage the mother would make bizarre comments, which would make me doubt her motivation, intention and psychology her mindset (sic)*'. He recounts an occasion when, according to him, while out walking the mother told him '*I wish the snake would bite me*'.
29. The father says in his first statement, talking about the early days of the marriage, that the mother was keen to travel to England and, therefore, he returned to England to continue to work. This meant of course that the parties lived separately for substantial periods of time: the father in Leeds; the mother with his family in the village in Pakistan (albeit, on the father's account, she also spent considerable time with her own family). From an early stage the father started to obtain advice and began taking steps to apply for a visa to enable the mother to enter the United Kingdom.
30. Soon after the marriage the mother became pregnant. On 5 June 2012, the parties' daughter, J, was born in Pakistan. The father did not return from England for the birth, although - according to him - he did travel to Pakistan '*within three months of her birth*'. He explains that this delay in visiting his new-born daughter was due in part to his work commitments and in part '*to my commitments in submitting the mother's visa application*'. This suggests that obtaining the visa was, at that stage, a matter of significant importance for the parties.

31. The father recounts that following the birth of J there were significant disagreements between the parties. Among other things, the mother apparently alleged that he was deliberately delaying the immigration process; even trivial disagreements between them would result in her threatening to leave with the baby. The father emphasises that he and his family tried very hard to please the mother and keep her happy. I infer from his evidence that she was significantly unhappy and that the main cause of her unhappiness was her living situation: she wanted to be living in England and not with the father's family in Pakistan. The mother was keen to improve her English and the father paid for her to attend a course to this end; knowledge of English was a prerequisite for her to obtain a UK spousal visa.
32. The father describes that, following J's birth, the maternal family put a lot of pressure on him to allow the mother and J to move from the paternal home to their home. Despite this contradicting '*our traditional*' (sic) the father intimates that he permitted the mother to move, telling her that she could do what made her happy. However, it soon became clear to him that, as he puts it, '*the lack of facilities at the maternal family's home address were not adequate.*'
33. The father says that, by contrast with the maternal home, the paternal home had better facilities. In particular, he describes that '*There was facilities in place for electric when this was cut out and items like air conditioning. The home was appropriately well-kept and decorated in comparison to the maternal family home.*' By implication, therefore, these relatively basic amenities were lacking from the maternal home; nevertheless, despite those shortcomings, the mother chose to live there with J in preference to remaining with the paternal family.
34. The father's suggestion that the maternal property was inadequate as a home for his daughter is consistent with the mother's description of the home in her third statement, where she says (referring to the period after March 2019):

'My family's home has 8 bedrooms. My mother, aunt, grandmother, 6 siblings and my aunt's 4 children live in the home. We were 6 of us in one bedroom. My mother, my one sister and myself had one bedroom with the children. There were 3 beds in the room.'

35. Having travelled to Pakistan within 3 months of J's birth, the father then remained there for a period of two to three months before returning to England. He says that it was 'heart-breaking' for him to leave the mother and J behind, but that he had to take that step in order to continue his efforts to secure the mother's passage to England as his spouse. This clearly continued to be a matter of priority for the parties.
36. The father says that he made his first immigration application on behalf of the mother when J was three months old. This does not entirely fit, timing-wise, with his account of the dates on which he travelled to Pakistan following J's birth, but I do not think there is any significance in the precise sequence of events. At the same time as making an application on behalf of the mother, he applied for a British passport for J. The latter application was successful, whereas the mother's application for a visa was refused.
37. The father says that the mother blamed him for the rejection of her visa application and even suggested at one point that he should take J to England without her in order to enhance the chances of a further application for a visa being successful (a suggestion he rejected on the basis that it would not be in J's interests to be separated from her mother at such a young age). If it is true that the mother made such a suggestion (as to which I can make no finding), it would be a powerful indicator of the strength of her desire to leave Pakistan and move to England.
38. There was a period of some three years between J's birth in 2012 and 2015, in which the parties were living their married life across two continents. The mother was in Pakistan, living in either the sub-standard maternal home or with the paternal family (a worse option from her perspective). The father was living in England and, on his case, travelling to Pakistan 'at least on one occasion per year, if not more' when he would 'stay for a minimum [of] one month if not longer.' According to him, the stressful situation in which the mother found herself was taking its toll upon her. He says, among other things, that she would shout abuse at J and that on one occasion she slapped her to her arms and face. I am not able to make any findings about this.

39. The extent of the mother's dissatisfaction with her situation in Pakistan is illustrated by the fact that she apparently told the father on one occasion that '*she wanted to come to England and would be happy with me even if we were all living out of one room*'.
40. On 26 May 2015, at long last, the mother was able to travel to England with J following a successful immigration appeal. She moved to live with the father at a property he had by that time acquired in Leeds. The mother's own father had been living with the father at the property and continued to do so following her arrival.
41. From the father's account, it appears that the mother became much happier after the move to England and that relations between the improved considerably. He says that she soon fell pregnant with their second child; that both of them were pleased with the birth; and that they were getting on very well. A pattern of life developed whereby he would go out to work while she was at home caring for J. My understanding is that the father worked long hours, often well into the night returning home on occasion as late as 6 am.
42. In February 2016, the parties' second child, K was born.
43. The following summer, when K was six months old, the parties went on holiday to Pakistan. The father describes it as '*an excellent holiday*' during which the mother revealed that she was again pregnant.
44. Following that holiday, it is the father's case that the mother's behaviour changed considerably. He asserts that he became sufficiently concerned to raise the matter with the midwife and that he formed the view that she was suffering from post-natal depression. It is clear from the papers that there was an ongoing dispute about money. The mother alleges that the father was financially controlling; for his part he asserts that she was unreasonable in her demands for money, which she wanted in order to purchase unaffordable luxuries. He describes the mother's behaviour towards him as '*shameful*' but says that he '*tolerated*' it as he loved her and did not want to lose the children.
45. It is apparent that by the end of 2016 the marriage had deteriorated and there were frequent disputes between the parties. The father says that the mother would shout and

scream in the house, an allegation which I understand is accepted (at least to some extent) by the mother.

46. On 6 November 2016, J's school made a referral to social services after J (then aged 4) disclosed to a member of staff at the school that the father had hit the mother across the face. A subsequent assessment from Leeds City Council, which appears in the court bundle, records that during the course of this referral it was documented that on a previous occasion, 4 October 2016, J had disclosed at school that the father slapped her (that is, J) across the face. Following a meeting at the school in which the father appeared to be shocked by the allegation and at which he and J were seen to be getting on well, the earlier allegation had not been taken any further by the school.

47. In February 2017, the parties' third child, L, was born.

48. On 15 June 2017 J's school made another further referral to social services. The second assessment that was later prepared by Leeds City Council records that J had disclosed to a teacher that '*her father hit her mother and put his fingers on mother's throat*'. Staff at the school had spoken to the mother who had reported that, following an argument about money, the father '*had hit her on the head with his hands on 13th June*'. The mother had also alleged that two weeks previously, while sitting on the sofa, the father had '*grabbed [her] by the throat and pressed down hard enough to leave bruises*'. She said she had taken pictures of her injuries but that these had been deleted by the father. Subsequently, she appears to have denied to a social worker that the father had placed his hands around her throat alleging instead that the father '*had pushed her head back which caused her to bang her head*'. In this context, it was a matter of concern to social services that she '*appeared to minimise this incident*'. It was noted that she was unwilling to report the matter to the police and did not want to work with social services in relation to domestic abuse.

49. The assessment also records that the mother '*informed*' (I assume a member of staff at the school) that she had previously been threatened by the father; he is alleged to have said that if she were to disclose the abuse she had suffered to anyone, he would keep the children and she would have nothing. She said she had suffered abuse, including physical abuse, since her arrival in the UK. She had not disclosed it as to do so was

'embarrassing' and *'shameful'* on her and her family. She said that she wanted to remain living with the father but wanted her visa to be cleared and wanted to receive the child benefit. She reported that the father controlled the finances and did not give her any money.

50. During the course of the second social services investigation J was seen three times alone and *'on each of these sessions [she was] able to recall the domestic abuse incident'* which she had reported to the school. She reported being generally happy at home *'although she does get shouted at by dad when she does not share toys with her younger brothers.'* She did not disclose any further incidents.

51. The social work assessment noted that there did not appear to be any concerns regarding the physical presentation of the children or their behaviour at home. They observed that the younger children had access to toys at home although these were limited. It was noted that *'[the mother] is fairly socially isolated as a result of the language barrier however she is willing to engage with the local children' (sic) centre'*.

52. The assessment records at the bottom of page 4 that:

'It is clear that the children have been exposed to domestic abuse including verbal and physical abuse between their parents. Father has maintained that they did argue but denies ever assaulting [the mother]. He felt that he has been under pressure financially due to him opening a shop, which has caused tension in the home.'

It further records on page 6 that:

'I believe that there has been on going domestic abuse in the home and I believe that as the family are not willing to access support services to address the issues within their relationship, this is something that may continue, thus placing the children at risk of emotional harm. However it is my view that at this stage there is no threshold for progressing the case to initial child protection conference however the family are not willing to work with care under a child in need plan. However mother has agreed to work with the local children's centre, who will be able to support her regarding social isolation, finances and visa. Additional workers will also be able to provide support regarding domestic abuse.'

The case was then closed.

53. Although, without hearing oral evidence, I cannot make any findings as to the truth of the allegations that were investigated by social services (which are firmly denied by the father), I consider that for the purposes of any interim welfare determination I am entitled to attach a degree of weight to the conclusions reached in the second assessment bearing in mind that those conclusions were based, in part, on several interviews with J in which she maintained her account; the social workers clearly did not consider that her account was invented or the product of coaching. In the context of the father's allegation within these proceedings that the mother had been repeatedly urging J – *'brainwashing'* her - to tell her teachers that *'I hit and argue with her mother'* it is relevant to note also that: (a) this was not an explanation which was offered by the father at the time of the assessment; and (b) there was an element of detail given by J in her account which does not sit easily with the notion what she was saying was merely rehearsed. Nor did the father assert at the time that, as he now claims, the day prior to J making one of her allegations to the school, the mother had specifically encouraged her to *'tell school tomorrow and say to them that dad hit you.'*
54. The father's case in these proceedings is that whereas various allegations were made to professionals against him by either the mother or J, the true position was that it was in fact the mother who used to hit the children. He claims that he did not report her as he was scared that he would not have a leg to stand on. I am not in a position to make any findings about these matters, although it is pertinent to note that the father's media exhibits do include videos in which the mother can be observed losing her temper with the father and that there is a transcript/translation of a recording in which contains at least one reference to her *'beat[ing]'* the children (the word 'beat' is an English translation from the original Urdu or Pothawi, which may or may not be accurate). I comment further below on the covert recordings.
55. Returning to the chronology, in July 2017 the mother's father had a heart attack and came (again) to live at the family home. It is not clear to me how long he remained living there.
56. In January 2018 the father submitted an application on the mother's behalf to extend her spousal visa.

57. On 28 June 2018 there was an incident at the family home which led to the police attending after the mother had made an emergency 999 call. During the incident, the mother sustained an injury to her eye, which, she alleges, was caused by the father assaulting her. The police summary records that the officers who attended the home observed ‘*a small lump*’ to the right side of the mother’s head. The father appeared calm while mother was said to appear ‘*frightened and upset*’. The father was arrested by the police, but they did not bring any charges against him as the mother refused to provide a statement.
58. A referral from the police led to a further (third) assessment being undertaken by Leeds City Council. According to the referral, the police made reference to a previous incident of domestic abuse which had allegedly occurred in May 2017 when, it was said, the father had grabbed the mother around the throat and punched her twice in the head. It was said that this had not been reported at the time.
59. As part of the third assessment undertaken by Leeds City Council social workers went to the family home on 19 July 2018 where they spoke to the mother with assistance from an interpreter. She gave an account of the recent incident, which she said had resulted from an argument over her refusal, immediately when requested, to make the father a drink of tea. As he was about to leave the house, she said, the father had hit her to the side of the head causing swelling. She claimed to have contacted the police as she was angry, as opposed to scared. She claimed that the children had not witnessed the incident. She said she felt hopeful that the father ‘*had learned his lesson*’ and denied that he hit her on a regular basis – ‘*just the two occasions already noted*’.
60. The social workers undertook a further home visit on 16 August 2018 when they spoke to the father. He said that he had ‘*totally forgot now*’ (sic) when asked about the domestic incident. He stated that the mother ‘*gets really angry*’. He alleged the injury had been caused in circumstances where the mother had lost her temper and begun pushing as he was trying to leave the house. He said that he ‘*thinks*’ the injury ‘*was caused by him throwing a toy at her and even suggested that she could have done it herself.*’ While I can make no finding about the incident, it is relevant to note that the explanation offered contemporaneously by the father is inconsistent with his statement in these proceedings

where he asserts that it was in fact the mother who was throwing toys at him and that her injury was caused while reaching for the toys when *'somehow she must have caught herself and bruised her right eye'*.

61. It is also relevant to note that during the course of this third assessment J stated that she was happy living at home and described her father as *'funny and kind'*. She said that she had an older brother and sister in Pakistan and told the social worker that she liked living in England because *'there are lots of shops and parks to go to'*. She was observed seeking affection from the father.

62. The social worker who completed the assessment recorded, amongst other concerns, that:

'Domestic abuse seems to be a re-occurring factor in [the] marriage which is likely to have a negative impact on the children and their sense of security. If parents do not change how they manage their differences or disputes then this could result in the situation escalating and the children being exposed to domestic incidents in the future. Subsequently, the children's safety needs will not be met by parents and the children are likely to be at risk of emotional and physical harm. Furthermore, [the father] has not taken any responsibility for the physical violence he has caused to [the mother] and has minimised and deflected this when challenged by CSWS. This raises concern around [the father's] ability to work openly with professionals. Observations of [the father] during the assessment are positive. He has spoken about how he tried to take steps towards managing difficult situations around the house when verbal arguments ensued between him and [the mother].'

63. The assessment, which was shared with the parents on 6 September 2018, also recorded the following in relation to the mother:

'[The mother] needs to be able to manage her anger around the children as this is likely to result in unpredictable parenting responses which could impact on the children emotionally. [The father] has voiced concerns around [the mother] presenting as angry and observations made of [the mother] during visits do reflect her frustration. [The mother's] anger and frustration may be further exacerbated because she has limited access to support networks and family and not much independency. A positive of the assessment is that [the father] has been supportive of [the mother] accessing external agencies and has spoken about how he has encouraged [the mother] to attend the doctors about her anger himself which [the mother] has confirmed. [The mother] has agreed to accessing external services would like to attend the ESOL course. She reports that her husband is supportive of this which doesn't suggest that he isn't (sic) [this should read 'is'] controlling towards her or restricting her from accessing support social networks.'

64. It is also relevant to note from this assessment that the mother reported that she had no family or friends and '*only has support from her husband*'. She also advised the social worker that J was '*likely to say that she isn't happy as her daughter misses her grandmother in Pakistan and wishes to return there*' (which I think should be read as meaning that J wished to *visit* Pakistan to see her grandmother as opposed to moving to *live* there). The overall conclusion reached was that the children were not at risk and the case was closed.

65. It is the father's case that following his arrest in the summer of 2018 he '*lost faith*' in the mother and installed a spy camera in the home. Within these proceedings he has exhibited various recordings in which the mother can be seen to be angry or upset. On the father's case these recordings corroborate his case that she was the aggressor in the marriage and that the allegations of abuse made against him are false.

66. While I again emphasise that I am not in position to make findings of fact at this stage, it does seem to me that I need to treat the covert recordings made by the father with a considerable degree of caution. To begin with, the late service of the evidence has meant that the mother's legal team have not been able to check the accuracy of the transcriptions or to take proper instructions as to the contents of the recordings. I also need to bear in mind that:

(a) The spy camera was constantly recording the mother in the home and the father has been able to check the recording and cherry pick those excerpts he considers helpful to his case. They are unlikely in my view to offer a fair and balanced picture of the parties' relationship.

(b) The father was obviously aware of the existence of the recording device whereas the mother was not. He will have been in a position to stage manage situations, for example provoking the mother to become angry while portraying himself as calm.

67. It is likely, in my view, that any court conducting a full fact-finding exercise will have to bear these matters in mind and exercise caution before attaching significant weight to the recordings.
68. I also consider that the father's act in installing a covert recording device was a serious violation of the mother's privacy. In my view, it corroborates her case that he was controlling in his behaviour towards her.
69. In October 2018 the parties were notified that the mother had been only partially successful in her efforts to extend her spousal visa. An extension for two and a half years had been granted. However, she had failed her English test, which disqualified her from being able to apply for indefinite leave to remain at the five-year stage. The parties were advised that they would need to follow what the father describes as '*the ten year rule*' – in other words the mother would need to reside in this jurisdiction for ten years before seeking a more settled immigration status.

The trip to Pakistan in March 2019

70. On 13 March 2019 the family travelled to Pakistan on tickets which had been booked in either December 2018 or January 2019. The basis on which they travelled there is in dispute and lies at the heart of the case.
71. The father says that the family went to Pakistan with the intention of relocating to that jurisdiction or at least seeing if they could settle there. He says that, having not travelled to Pakistan for two years, the mother in particular was anxious to go there to see her elderly grandmother before she died. He points to the fact that the mother was suffering from chronic headaches, for which she had been referred to a specialist within the NHS. She did not wish to undergo further investigative tests recommended by the specialist, having been advised that there were risks of serious side effects (as was put to her in cross examination). The father asserts that the mother would emphasise to him that the weather was better in Pakistan and that the children would have a better education in Pakistan. On his case, he was reluctant to relocate as he had a home and a job in Leeds. However, he says that he eventually agreed to move and that the parties agreed that they would sell the house and the car and '*move to Pakistan permanently*'. The father says that, by

agreement with the mother, he booked single tickets for the mother and children and a return ticket for himself; the return leg was booked for June 2019 (he had to come back to England to complete various tasks such as selling the house), but in the event he brought his return journey forward to April after learning that his car had been broken into.

72. The mother disputes the father's account. She asserts that it was his idea to travel to Pakistan; she had no wish to do so in the middle of the school term. On her case, the father persuaded her by claiming falsely that his father was terminally ill. She travelled on the express understanding that the trip was to be for no longer than approximately a month and that the children would be back in England in time for the start of the summer term. It is the mother's case that following the family's arrival in Pakistan the father removed from her the children's passports as well as her own passport. On 10 April 2019, the mother says that father informed her that she and the children would be remaining in Pakistan permanently. She says that just over a week later he returned to England without telling her, leaving her stranded with the children in Pakistan.
73. It is clear from both parties' evidence that on or about 29 April 2019 the mother contacted the children's school in Leeds to seek their assistance for her to return to England with the children. The school then contacted the police. The police in turn contacted the father and informed him that they had received an allegation that he had retained the children's passports. He denied this.
74. The mother's case is that, having been abandoned in Pakistan, it was her strong wish to be able to return to England with the children, but she could not do so without passports. She communicated with the father who led her to believe that he would take steps to arrange for her return. The father denies this. He claims that '*she never told me she wants to come back to England and the first I heard of this was after her return*' (i.e. after March 2020).
75. The father next travelled to Pakistan on 7 November 2019 and remained there until 12 December 2019. The mother alleges that during the trip she was assaulted by the father. He denies this and I am not in a position to make any finding at this hearing. By this stage he had sold the family home in Leeds and so, when he returned to England, he will have moved to rented accommodation (although I am not aware of the details). He

explains in his evidence that he came back to England so that he could work over the Christmas period; the intention, he says, was that he would return to Pakistan in May 2020 and thereafter live there permanently.

76. In around December 2019 the mother attended the British High Commission in Islamabad. She says that she was informed (correctly, I add) that she was unable to obtain replacement passports for the children without the consent of the father (with whom she shares parental responsibility). She was able to obtain a replacement Pakistani passport for herself and on 19 February 2020 she was granted a replacement visa allowing her to enter the United Kingdom.

77. The mother left Pakistan and returned to England on 10 March 2020. She travelled without the children, leaving them with members of her family. Following her departure, the children were removed from the maternal relatives by members of the paternal family and have lived in the paternal family home since then. The father describes the mother's action in returning to England without the children as '*not culturally acceptable*'. Following her arrival in England the mother stayed briefly with her father, but for the last few months she has been living in a refuge in London.

78. On 15 March 2020 the father travelled to Pakistan to be with the children. He remained there until he travelled back to England for the purposes of these proceedings on 7 July 2020.

79. Since her arrival in this jurisdiction the mother has taken steps to secure the return of the children from Pakistan. She instructed solicitors and issued wardship proceedings on 2 June 2020.

Determination on the core factual issue

80. In my judgment, it is clear on a balance of probabilities that the essence of the mother's case is correct. I find that when the family travelled to Pakistan in March 2019 it was on the understanding that it was to be a trip of short duration of about a month. I reject the father's case that they travelled pursuant to an agreed plan to relocate to that jurisdiction. I am entirely satisfied that, whereas the mother believed she was travelling to Pakistan for a visit, the father had other uncommunicated intentions from the outset. His intention was

to leave the mother and the children in Pakistan and to prevent them from returning to England; this he then did. He procured the mother's agreement to go to Pakistan by deception. In summary, I conclude on the core issue that as a result of the father's actions, the mother and the children became victims of transnational abandonment, as she alleges.

81. Although I have not been able to hear oral evidence from the parties (save for some limited evidence in chief and a partial cross examination of the mother) I have reached my conclusions for the following reasons:

(a) It is clear from the background which I have summarised above that the mother had been deeply unhappy living in Pakistan in the early years of the marriage. She wished strongly to move to England and obtaining the requisite visa was a priority for the family. It had taken the mother nearly four years to obtain a visa. In October 2018 the visa had been extended for two and a half years. It is in my view improbable, in that context, that the mother would have abandoned her long-held desire to live in England under a settled immigration status and instead relocate to Pakistan.

(b) During the course of the various social work assessments, the mother was interviewed on several occasions by social workers. Although the social workers gained the clear (and, in my view, accurate) impression that the mother was socially isolated in this jurisdiction, the mother did not in those interviews express a wish to be living in Pakistan.

(c) One of the mother's reasons for not wishing to live in Pakistan was, on the father's evidence, that she had no wish to live with his family and her own family's home was unsuitable as a home for the children. It was unsuitable as it lacked certain basic amenities and was too small for the number of people in occupation. It is, in my view, highly unlikely that the mother would have agreed to give up the secure family home in Leeds and relocate to Pakistan in circumstances which would require her to choose between two wholly unsatisfactory options as to housing.

(d) It is either common ground or beyond dispute that when the family travelled to Pakistan in March 2019 they did so without informing the children's school that they would not be returning. The children – J and K in particular – were given no

opportunity to say goodbye to their teachers and friends. I do not believe that the mother would have allowed J or K to depart in these circumstances. If she had known that family were leaving Pakistan never to return, there would have been no reason not to tell the school. Apart from the fact that failing to inform the school in such circumstances would have been discourteous (which I do not believe the mother to be) it would also have been contrary to the interests of J and K.

- (e) I consider it unlikely that the family would have chosen to relocate to Pakistan in the middle of the school year in circumstances where no arrangements had been made for the children to start school immediately upon their arrival in Pakistan. The information from the Pakistani school is that they did not become enrolled there until May 2019. There was no pressing need to relocate at the time which justified an interruption to the children's education.
- (f) In April 2019, soon after the mother says that she was abandoned in Pakistan, she contacted the school to report the fact that she and the children had been stranded and to seek their assistance. The school took the matter sufficiently seriously to contact the police. I consider it incredibly unlikely that she would have done this, as the father asserts, as part of '*her bigger plan to persuade everyone that I am a bad person and I have mistreated her*'. On the contrary, I consider that her contacting the school for help is consistent with her being in a state of desperation. She had nothing to gain by making a false allegation in circumstances where she was in Pakistan at the time, completely reliant upon the father to provide her with limited financial support and in close proximity to the extended families on both sides.
- (g) In order to return to this jurisdiction it was necessary for the mother to obtain a new passport and visa. I believe it is wholly implausible that the mother would have taken these steps as part of an elaborate charade if, as the father maintains, all along her own passport and those of the children were in her possession. I find that it is even more unlikely that the mother would have left the children behind in Pakistan when she travelled to England in March 2020 if, at the time, the children's passports were in her possession and she had thus had the option of bringing them with her. Having been the children's primary carer throughout their lives, her action in leaving without the children strongly supports the notion that she was in a state of desperation at the time.

- (h) The father has produced various WhatsApp messages and voice recordings. These do not, in my judgment, support his case that the March 2019 trip to Pakistan was an agreed relocation – especially bearing in mind that the father has been able to cherry pick such messages as he considers will assist his case. It is noteworthy that he has not produced any messages passing between the parties in the critical early months of 2019.
- (i) In one of the voice messages sent to the mother following her return from Pakistan in March 2020 (the transcription and translation of which was produced by the father immediately before the start of the hearing), the father said the following:

‘We came back here because we could not do anything, you used to jump back then. You were destroying everything, that’s why I took you back, your father also said that do not take her back, and I made you live here, I did not leave you, used to send you money as well. I was serving you, used to come home, and everything.’

In another message he said:

‘I made you live here so that your health could improve, you could understand about the family and everything. You were demanding for divorce there and freedom. When I used to ask about the reason, you replied that you do not want to live with me.’

During the course of the third day of the hearing, I invited Mr Vollenweider to take his client’s instructions as to what was meant by these messages. Having taken instructions, Mr Vollenweider communicated to me that his preference was not to set out specifically what the father says about those messages absent a direction from me requiring him to do so, although he was able to confirm that the word ‘*here*’ in the messages was a reference to Pakistan. Mr Vollenweider submitted that, without wishing to inform me what he had been told, I should bear in mind that the Peshwari word which has been translated as ‘*made*’ may have a more nuanced meaning encapsulating the notion that actions taken by the father were done for the mother’s benefit and with the best of intentions. I do not consider that submission to be persuasive, especially bearing in mind that the certified translation was obtained by the father. In the absence of a proper explanation from the father, I find that the

messages should be interpreted as they read. They amount to an admission by the father that he did as the mother alleges, namely leave her stranded in Pakistan against her wishes. Even if it was the father's view that he was acting with the best of intentions that would not mitigate the seriousness of what he did. I should also note that the messages and the hint of an explanation I was offered are inconsistent with the father's written evidence that the genesis of the trip to Pakistan was the mother's wish to see her grandmother.

- (j) In addition to extracts from the messages I have referred to above, the voice recordings include a reference by the father to the fact that the mother used to 'disobey me', which suggests that he expected obedience on her part and is an indicator that there was coercion in the relationship.

- (k) It is a strong indicator about how the mother felt about her time in Pakistan that in various messages she emphasised to the father that under no circumstances would she return there – not even if a member of her family or the children were to die. In a message sent on 24 March 2020 she explained that while in Pakistan '*I used to weep my heart out after listening to what people say. I used to cry all night and pray Allah give me death or I could go far away from this place.*' As a loving mother who had been the primary carer of the children throughout their lives, it is a measure of the desperation she felt about her time in Pakistan that she was unable to contemplate returning there even if it meant being separated from her children, and indeed other members of her own family.

- (l) Following the mother's arrival in this jurisdiction in March 2020, the father initially indicated that he would return here with the children, before then changing his mind – purportedly for COVID 19-related reasons. In so proposing, it is notable that the father did not request the mother to provide him with passports for the children or seek her consent to obtain new passports. These omissions are consistent with the mother's case that he was in possession of the passports

82. The father makes a number of submissions as to why his version of events is likely to be true. I can summarise the points he makes as follows:

- (a) It is submitted that the '*lengthy delay*' on the mother's part in taking action indicates that there was nothing untoward in her residence in Pakistan. I do not consider that there was lengthy delay. I have already highlighted the fact that the mother very promptly sought help by contacting the school. She was in an exceptionally difficult situation in close proximity to the father's family without access to her passport. There was little she could do. On her case she repeatedly sought to persuade the father to allow her and the children to come back to England. In her exceptionally difficult situation she may well have judged (naively) that this was the means by which she stood the best prospect of returning home.
- (b) He contends that there is a lack of contemporaneous evidence of the mother's alarm at the father's abandonment. I reject that submission in view of the matters I have described above.
- (c) It is suggested that enrolling the children in a school is an indicator that the mother was content with the situation. There is a dispute about the precise position regarding schooling, but in any event I do not find this point at all persuasive. It seems to me that having been placed in the position where she was coerced into remaining in Pakistan, she acted responsibly by taking steps to mitigate the situation for the children and allowing them to attend school.
- (d) The father relies upon the fact that a substantial quantity of belongings were shipped from England to Pakistan in advance of the trip. I have seen a cargo receipt and an email confirmation which together demonstrate that the father caused 200 kg of cargo to be sent (I infer to Pakistan) in October 2018 and a further 220 kg to be sent in January 2019. There is no evidence as to what the earlier shipment contained or to whom it was sent. The cargo receipt shows that several different bags of differing weight were sent in January. The mother accepts that a significant quantity of items were indeed sent to Pakistan; but on her case these essentially comprised provisions for the month the family were to spend in Pakistan as well as extensive gifts for the wider family. Without hearing oral evidence I am not in a position to make findings as to what exactly was sent to Pakistan. In my judgment, however, the documentary evidence on this point is consistent with both parties' cases and is not sufficient to

outweigh the considerable evidence which points to the truth of the mother's allegations.

(e) It is suggested that the mother's health and social isolation were motivating factors for her to want to live in Pakistan. I have seen no corroborating evidence to suggest that either her undoubted isolation or the health issues from which she suffered led her to wish to relocate to Pakistan.

83. During the course of submissions concerning the admission of the new material, it was submitted to me that the mother's angry and/or aggressive and/or argumentative demeanour in some of the videos was inconsistent with the notion that she was a victim of domestic abuse. I entirely reject that submission. As I have already explained, the nature of the covert recordings has meant that the father has been in a position to cherry pick and stage manage evidence to suit his case. Without hearing evidence, I cannot make a finding that this is what he has *in fact* done, but I need to approach the recordings with caution.

84. Moreover, the notion that a person who is sometimes angry, argumentative or aggressive is unlikely to be a victim of domestic abuse is based upon an outdated stereotype. It is a fallacy that a victim of domestic abuse is likely to display at all times a meek or cowed demeanour. Domestic abuse can arise in many circumstances with differing degrees of seriousness. A person can experience periodic abuse while at the same time, in other contexts, leading a successful life. Domestic abuse – especially abuse that is coercive or controlling in character - often stems from an imbalance of power in a relationship; the relationship becomes abusive when that imbalance is misused. It seems likely to me that the power in this marriage lay with the father who – as I have said – did not expect his wife to 'disobey' him. She, by contrast, was vulnerable: she was socially isolated; her immigration status was insecure; her English was very poor; she had no means of supporting herself financially and was wholly dependent upon such provision as the father chose to give her. The mere fact that there exists an imbalance of power does not, of course, mean that it has been misused.

85. I have refrained from making any findings of fact about the allegations of domestic abuse; however, I reject the contention that the mother's demeanour in the videos should lead me to the view that they are likely to be untrue. On the contrary, as I have made clear in my survey of the evidence, there are indicators in the evidence as regards the allegations which were reported to third party authorities, which point towards the opposite conclusion.

Jurisdiction

86. On behalf of the mother, Ms Chowkory submits that the English courts have jurisdiction in relation to the children on the following three potential bases:

- (a) Pursuant to Article 8 of Brussels IIa' on the basis that the children were habitually resident in England and Wales on the date proceedings were commenced;
and/or
- (b) Pursuant to Article 10 of Brussels IIa on the basis that the children were previously habitually resident in England and Wales, but that either:
 - (i) They were wrongfully removed from England and Wales when they were taken to Pakistan in March 2019;
or
 - (ii) They were wrongfully retained away from England and Wales when the father prevented their return to this jurisdiction in April 2019;
or, alternatively
- (c) In the event that the above grounds for jurisdiction do not apply, pursuant to what is sometimes termed the nationality or *parens patriae* jurisdiction which in certain circumstances the court can exercise in respect of children who are nationals of the United Kingdom.

87. Each of Articles 8 and 10 require the court to give consideration to the question of the children's habitual residence. For the purposes of this judgment I do not need to analyse in detail the concept of habitual residence which has been considered by the Supreme Court on a number of occasions since 2011. In *Re B (A Minor: Habitual Residence)* [2016] EWHC 2174. Hayden J summarised the principles to be drawn from those authorities as follows:

- i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (*A v A*, adopting the European test).
- ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (*A v A*, *Re KL*).
- iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': *A v A* (para 80(ii)); *Re B* (para 42) applying *Mercredi v Chaffe* at para 46).
- iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (*Re R*);
- v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (*Re LC*). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.
- vi) Parental intention is relevant to the assessment, but not determinative (*Re KL*, *Re R* and *Re B*);
- vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (*Re B*); (emphasis added);
- viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (*Re B* – see in particular the guidance at para 46);
- ix) It is the **stability** of a child's residence as opposed to its *permanence* which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (*Re R* and earlier in *Re KL* and *Mercredi*);
- x) The relevant question is whether a child has achieved **some degree** of integration in social and family environment; it is not necessary for a child to be *fully* integrated before becoming habitually resident (*Re R*) (emphasis added);
- xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new

habitual residence in a single day (*A v A; Re B*). In the latter case Lord Wilson referred (para 45) those '*first roots*' which represent the requisite degree of integration and which a child will '*probably*' put down '*quite quickly*' following a move;

xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (*Re R*).

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

88. As is well known, in *Re B (A Child) (Habitual Residence)* [2016] UKSC 4, Lord Wilson drew an analogy between the process by which the habitual residence of a child transfers from one jurisdiction to another and the operation of a see saw. The context in which he did so, was his conclusion that it is likely that a transfer will take place seamlessly and that an existing habitual residence will be lost at the same time a new one is gained.

89. More recently, in *Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, the Court of Appeal held that the see-saw analogy needs to be approached with some caution. Moylan LJ emphasised at paragraph 58 that:

‘Lord Wilson’s analogy and his other observations were directed simply to the expectation that the acquisition of a new habitual residence would be likely to coincide with the loss of the previous habitual residence. He did not intend to alter the key question which, in every case, is: where is the child habitually resident? Even though the acquisition of a new habitual residence can be expected to coincide with the loss of the previous one, hence the see-saw analogy, this issue is not determined by asking simply the question whether a child has lost their habitual residence. In addition to the passages I have

quoted above, this is clear from his observation, at [46], that “the identification of a child’s habitual residence is overwhelmingly a question of fact” and from the balancing exercise he undertook, at [49] and [50].’

He concluded at paragraphs 61 and 62 that:

‘while Lord Wilson’s see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in *A v A* and other cases to the approach which should be taken to the determination of the habitual residence. This requires an analysis of the child’s situation in and connections with the state or states in which he or she is said to be habitually resident for the purpose of determining in which state he or she has the requisite degree of integration to mean that their residence there is habitual.

Further, the analogy needs to be used with caution because if it is applied as though it is the test for habitual residence it can, as in my view is demonstrated by the present case, result in the court’s focus being disproportionately on the extent of a child’s continuing roots or connections with and/or on an historical analysis of their previous roots or connections rather than focusing, as is required, on the child’s *current* situation (at the relevant date). This is not to say continuing or historical connections are not relevant but they are part of, not the primary focus of, the court’s analysis when deciding the critical question which is *where* is the child habitually resident and not, simply, *when* was a previous habitual residence lost.’

The essential element of the ‘core guidance’ to which Moylan LJ referred is that *‘The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment’*.

90. At paragraph 63 of his judgment Moylan LJ endorsed, with one exception, the helpful summary of the law provided by Hayden J in *Re B (A Minor: Habitual Residence)*, which I have set out above. The exception was that bullet point (viii) of the summary should be omitted as it ‘*might distract the court from the essential task of analysing “the situation of the child” at the date relevant for the purposes of establishing jurisdiction*’

Article 10

91. I deal first with Article 10 of Brussels IIa. It is established that where a child is subject to a wrongful removal or retention from England and Wales to a jurisdiction that is not a Brussels IIa Member State, the Courts of England and Wales retain jurisdiction indefinitely (subject always to the question of whether it is appropriate to exercise that jurisdiction): see *Re H (Jurisdiction)* [2014] EWCA Civ 1101.

92. It is common ground that until the departure of the children from England to Pakistan the children were habitually resident in this jurisdiction.

93. Although the children were taken to Pakistan by their parents ostensibly on a consensual basis, in my judgment, the mother was deceived into giving her consent. She was led to believe that the children were being taken to Pakistan on a trip of short duration. I find that the father had already formed an intention to abandon the mother and the children in Pakistan. He had, after all, purchased one-way tickets for them, in contrast to the return ticket he had acquired for himself.

94. In the circumstances where the mother’s consent was procured by a serious deception I do not consider that her consent was validly given; on the contrary, the deception operated so as to vitiate her consent: see *T v T (Abduction: Consent)* [1999] 2 FLR 912, *D v S (Abduction: Acquiescence)* [2008] 2 FLR 293 and *M v T (Abduction)* [2009] 1 FLR 1309.

95. In my judgment, therefore, the removal of the children, procured as it was on the basis of a deception, was in breach of the mother's rights of custody (which she undoubtedly had as a matter of English law) and was a wrongful removal for the purposes of the Article 10 of Brussels IIa.
96. If I am wrong in my conclusions as to wrongful removal, in my judgment, the father's actions in preventing the children from being returned from Pakistan to England, after the period of approximately a month for which it had been agreed they should travel there, was plainly a wrongful retention. It cannot be sensibly argued that the children acquired a new habitual residence in Pakistan over the course of a month or so when it had been agreed that they were to be there on holiday. Their home remained in England; their school remained in England; their father was intending to return to England; their mother had the same intention, ignorant until the last minute that the father would take steps to prevent her return; they were staying in accommodation which was wholly unsatisfactory as anything more than a short-term holiday base. The children did not achieve the requisite degree of integration necessary to become habitually resident in Pakistan. The nature of their residence lacked the important quality of stability; it was 'temporary or intermittent' in nature.
97. I address below the question of whether it is appropriate for me to exercise my jurisdiction or whether I should decline to do so.

Article 8

98. Having reached a decision that this court has jurisdiction in relation to Article 10 of Brussels IIa, it is unnecessary for me at this interim stage to consider the position under Article 8. It seems to me that the issue as to the children's habitual residence on 2 June 2020 is a more difficult question. On the one hand, the reason for their stay in Pakistan was that they and their mother were the victims of transnational abandonment and throughout they were living in wholly unsatisfactory circumstances; on the other hand,

aspects of their life in Pakistan, such as attending school, might be said to indicate that they acquired an habitual residence there. I remind myself that habitual residence is a purely factual question not to be overlaid with legal glosses. I also acknowledge that there is no ‘rule’ that one parent cannot by unilateral action cause a child’s habitual residence to be changed, although it seems to me that there is an important factual difference between a situation involving a ‘primary carer abduction’ and one where as a result of the actions of a parent, his spouse and children have been abandoned in another jurisdiction against their will.

99. In all the circumstances, I do not think it would be right for me to come to even a provisional view on this difficult question without hearing oral evidence and further argument on the point. It may in any event be academic in this case. Whether it is necessary for the court on a subsequent occasion to give consideration to this issue will be a matter for the Judge who deals with the case at any adjourned hearing.

Parens Patriae

100. Having reached my decision as to the applicability of Article 10 of Brussels IIa, it is not necessary for me to consider the jurisdiction to order the return of the children on the basis of their nationality. It is clearly established that the jurisdiction - which is limited in scope by the terms of the Family Law Act 1986, but includes the power to make an order for the return of children to this jurisdiction - exists if the grounds for jurisdiction under Brussels IIa do not apply in relation to any Member State. The more difficult question is whether that jurisdiction should be exercised.
101. Had I not concluded that I had jurisdiction under Article 10 of Brussels IIa, I would have determined that, on what I regard as the exceptional facts of this case, it was appropriate for me to exercise my *parens patriae* jurisdiction. I consider that the present circumstances are ‘*sufficiently compelling*’ to require or make it necessary that I should exercise my protective jurisdiction: see *Re M (a child)* [2020] EWCA Civ 922 at paragraph 105.

102. I am aware that there are ongoing proceedings issued by the father in Pakistan. However, I do not consider that it is reasonably possible for the mother to participate effectively in those proceedings, in circumstances where she has been the victim of transnational abandonment. The mother has no means of funding representation in those proceedings. I have no information as to the timescales within which it would be possible for her to make any application. Above all, I am quite clear that in the circumstances which I have described above the children are in need of urgent and immediate protection.

Exercise of jurisdiction under Article 10

103. Having concluded that this would be a case in which, factually, it would be appropriate to exercise a *parens patriae* jurisdiction, it follows that I also consider it appropriate to exercise jurisdiction under Article 10. In addition to the matters above, it is of course highly relevant that both parties are in this country; they both have legal aid and specialist representation. I have been provided with considerable information and am in good position to make the urgent interim determination which the children require.

Making a return order

104. Having decided that I should exercise my jurisdiction under Article 10, I must next consider whether I should make an order for the children to be returned to this jurisdiction (as sought by the mother) or whether I should allow the children to remain in Pakistan pending the adjourned hearing which is likely to be in 2 or 3 months' time.

105. In deciding this question, the welfare of the children is my paramount consideration. Although I am being asked to make an order under the inherent jurisdiction and not the Children Act 1989, I have regard to the welfare checklist: see *In re NY (A Child) (Reunite International and others intervening)* [2019] UKSC 49.

Wishes and feelings

106. I have no independent evidence as to the wishes and feelings of the children. However, I accept, for these purposes, the mother's oral evidence that J told her in a recent telephone call that she was missing both of her parents. Not only is that self-evidently likely to be true, but the fact that the mother acknowledged that J was missing her father as well as her mother is an indicator that what the mother said was true.
107. I bear in mind also that in *Re D (A Child) (International Recognition)* [2016] EWCA Civ 12, in which it was held that hearing the voice of the child is a fundamental principle of procedure in England and Wales, it was also held that the obligation on the court in every case is to *consider* whether the voice of the child should be heard and, if so, by what means. It was acknowledged that in some cases it may be appropriate for this to be through one of the child's parents. When a court is considering whether to make an interim order for the return of a child who has been abducted to or is stranded in another jurisdiction it may well not be possible to canvass the views of the child by independent means. While this means that the court may be more cautious before making a return order in such cases, it does not mean that it is precluded from doing so. After all, one of the purposes of making a return order may be *to enable* a child's views to be properly and independently canvassed; that is so in this case.

Physical, emotional and educational needs

108. The children's physical needs can continue to be met whether they come here or remain in Pakistan. In my judgment, however, they have an urgent emotional need to be reunited with their parents. I consider it untenable for them to be in a jurisdiction without either parent, in particular their mother who has been their primary carer throughout their lives. For reasons set out below, I will refuse to permit the father to travel to Pakistan on an interim basis while they remain in that jurisdiction; this means that if I do not order their return the parental separation will continue. The recent tragic event involving the children's cousin means that it would, in my view, be intolerable for the children to remain away from their parents. To allow the situation to continue is likely to aggravate the emotional harm from which they will have suffered and be suffering as a result of being apart from their parents.

109. Although returning the children is likely to involve some disruption to their education, their ages are such that their education is not at a crucial stage.

The likely effect on the children of any change in their circumstances

110. Although ordering the children's return will mean them leaving the country in which they have lived for more than a year, it will entail restoring the normality and familiarity of life in the care of their parents. I consider the latter step essential to safeguard their emotional needs.

Age, sex and background

111. I consider that the relatively young ages of the children enhance the need for them to be reunited with their parents. The younger children in particular are likely to be experiencing the mixture of distress, shock, confusion and fear to which I referred earlier in this judgment.

Risk of harm

112. As I have already explained I consider that the children are likely to have suffered emotional harm and that this will be aggravated if a return order is not made.

113. The father alleges that the mother poses a risk of physical harm to the children. In my judgment, were that to be the case it is unlikely that he would have left her to look after them for lengthy periods of time while he remained in another jurisdiction. I also note that concerns about the mother were raised with social services but they did not consider it necessary to take any formal steps beyond their initial assessments.

Capability of the parents to meet the children's needs

114. In my judgment, having been the primary carer throughout the children's lives, the mother is the person best placed to meet the children's emotional needs. The father

has lived apart from them for lengthy periods of time and has not had the same involvement in their day to day lives as she has had. When the family were living together, he worked exceptionally hard – up to 7 days a week including long night shifts.

115. Equally, it is clear to me that the children have a good relationship with the father. This comes across in particular in the social work assessments. There is also the mother's evidence that J is missing both of them. Once the children return to this jurisdiction it is essential that they should be able to spend significant time with both their parents, while decisions are made about the longer term.

116. In all the circumstances I find that it is in the best interests of the children that I should order their immediate return to this jurisdiction. I will hear further submissions as to the timing and practicalities of the return, and the practical arrangements to be made following return.

Return of passport

117. The father seeks the return of his passport to enable him to return to Pakistan to be with his family at this difficult time. I have some sympathy with his position, but I am unable to allow him to do as he wishes until such time as the children have been returned to this jurisdiction and their own position is secure.

118. The finding I have made of transnational abandonment is very serious. I do not know whether the father will acknowledge my finding or whether he will seek to challenge it at the adjourned hearing at which he will have the opportunity to give evidence. Having made that finding, it seems to me that if I now permitted the father to return to Pakistan, there is a high risk that he would not return to this jurisdiction and would instead opt to play no further part in the proceedings.

119. I am troubled by the fact that despite the mother having been in England since March the father took no steps to bring the children to this jurisdiction. He initially proposed doing so, but then changed his mind on the basis (he says) that the COVID-19 pandemic meant that travelling was inappropriate. In his own statement, he refers to his concern in March about the children being in an ‘*emotional state*’ when they found themselves in Pakistan without their parents. In my view, the fact that he has not taken steps to facilitate contact with the mother coupled with the absence of any proposal from him to bring the children back to England in light of the tragic news concerning their cousin, suggests to me that he finds it difficult to prioritise the children’s needs when these conflict with his wider agenda to ensure that they are brought up in Pakistan with or without their mother.
120. I also bear in mind that the father no longer has a home in this jurisdiction and that, on his evidence, his intention was to live in Pakistan permanently from May 2020.
121. I have regard to the fact that the father attended this jurisdiction voluntarily and that he has participated in these proceedings. However, following the execution of the passport order it will now be apparent to him that the court has wide powers to prevent him from travelling. Moreover, after receiving this judgment, he may form the view that it will not necessarily be straightforward for him to achieve the outcome he desires through the courts in this jurisdiction – although I emphasise that I have not made any determination as to the children’s long-term future or even whether it is appropriate for the substantive litigation to continue to take place here beyond the adjourned hearing.
122. For the reasons set out above, my assessment is that there is a high risk that, if I permitted the father to return to Pakistan while the children remained there, he would cease to participate in these proceedings or, at least, he would not attend any further court hearings in this jurisdiction and would remain in Pakistan making difficult for any orders against him to be enforced.

123. I do not consider that the risk is lessened to any significant extent by the father's offer to post a £5,000 bond. Although I have little information as to the father's means, I observe that the sum offered is not much more than the costs he would have to incur in flying himself and the children here. Given that additionally he would then need to meet the children's costs of accommodation and subsistence while in England, there would be no economic incentive for him to come back.

124. In the event that the father simply absented himself from the jurisdiction, there is a high risk that the children would not then see their mother for a lengthy period of time, which would, in my view, be seriously detrimental to their interests.

RHQC

18.9.20