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Neutral Citation Number: [2024] EWHC 1373 (Fam)

No. FD24P00090

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 9 May 2024

Before:

MR JUSTICE MACDONALD

(1) BT

(2) WS

Applicants

The Applicants appeared in Person.

Hearing date: 9 May 2024

Approved Judgment

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MR JUSTICE MACDONALD:

INTRODUCTION

- 1 This matter has been listed to determine whether this court has jurisdiction to make orders in respect of Y, born in October 2021, and now aged 2 years and 7 months old. By an application issued on 25 March 2024, the parents of Y, BT (“the father”) and WS (“the mother”) apply under the inherent jurisdiction of the High Court for what they term an “order for voluntary return” in respect of Y. The application names the Social Administration of Linköping, Sweden, as the respondent. At a hearing on 11 April 2024, I discharged the Social Administration of Linköping as a respondent and listed the matter today for determination of jurisdiction. The matter now comes before the court for that issue to be considered.
- 2 The parents contend that this court has jurisdiction in respect of Y based on habitual residence. The parents have produced a Skeleton Argument setting out their arguments as to jurisdiction and the father has made oral submissions this morning on behalf of both parents, assisted by his wife, in relation to these matters. The court also has the benefit of a signed witness statement from the father.

BACKGROUND

- 3 The background to this matter can be stated relatively shortly. As I have noted, in their application form seeking what they term an “order for voluntary return”, the parents state as follows:

“We are the parents of a baby. The baby’s father is a British national (Overseas) and has arrived in England and live in London. Our baby was refused birth registration by the Finnish authorities two years ago and encountered police violence. We exhausted all legal remedies. Due to escaping mistreatment by the Finnish authorities, we went to Sweden, but recently social services took our baby away and denied our right to visit our baby. The Swedish authorities even denied the extended family to visit our baby and disallows us to employ a psychologist to investigate our baby’s situation.

As the matter progresses now, both of us are in London now as we terminated our asylum application in Sweden and were allowed to depart voluntarily to England. Regrettably, our daughter remains in Sweden and under the care of the Linköping social authority. According to the Swedish Migration Board’s decision, we are not allowed to travel with our daughter, but we need to seek assistance from a local authority in England to make the arrangement to travel our daughter to England. We sought assistance from the relevant social authority. However, they had concern over legal issues. Therefore, we need a court order to enable the authority to enable our voluntary care.”

- 4 The application made by the parents is supported by a statement of evidence, dated 18 March 2024, and signed by the father. The statement bears a statement of truth pursuant to FPR 2010 rule 17.2 in the following format:

“I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes or causes to be made a false statement in a document verified by a statement of truth without honest belief in its truth.”

- 5 In his statement in support of the parents’ application, the father makes the following assertions:
- a. The father was a temporary resident in Finland on a student visa from August 2016 to approximately November 2021 and the mother was with him on a family visa.
 - b. Y was born on 20 October 201 in Pori, Finland. The parents applied for birth registration documents for Y from the Finnish Health Authority, but were refused such documents on the grounds that the parents’ permanent address was in Hong Kong. The Finnish Administrative Court of Turku and the Supreme Administrative Court declined to grant relief with respect of refusal of the Finnish authorities to register Y’s birth for want of jurisdiction. The father contends he has an outstanding complaint before the European Court of Human Rights in respect of the family’s alleged treatment by the Finnish authorities.
 - c. The parents thereafter left Finland due to ill-treatment inflicted on the family by the Finnish authorities and thereafter led a peripatetic existence in Northern Europe in circumstances where the absence of registration documents for Y meant they could not leave the European Union. The parents eventually arrived in Sweden.
 - d. The father made an application for overseas birth registration for Y with the British authorities, but that was refused.
 - e. In May 2022, the father applied for a British National (Overseas) visa to live and work in the United Kingdom, which application was granted on 13 May 2022, but the family were unable to travel in circumstances where no travel documents could be secured for Y by reason of the Finnish authorities refusing to register her birth.
 - f. On 5 December 2023, the Linköping Police Authority arrested the parents and held them in custody until 10 December 2023. The parents allege that they were refused access to legal advice and consular assistance and were subjected to ill-treatment, contrary to Article 3 of the European Convention on Human Rights (during the course of his oral submissions, the father stated that this arrest was on suspicion of money laundering).
 - g. On 6 December 2023, the Social Administration of Linköping took Y into care against the opposition of the parents. The father asserts that the social workers from the Social Administration of Linköping indicated orally that they were removing Y as she did not have an identity document and the parents had failed to establish their biological relationship with her. The father further asserts that a best interests assessment, dated 7 December 2023, stated the reasons for Y being taken into care as the parents’ arrest, the risk the family would be detained under the Aliens Act, and that, even were the parents released, Y would still require care in circumstances where the parents refused to prove the parent/child relationship.
 - h. The parents were released from custody on 14 December 2023 without charge.

- i. On 15 December 2023, the Administrative Court of Linköping approved the application for removal of Y by the Social Administration. The parents appealed this decision, but the decision was upheld by the Administrative Court of Appeal of Jönköping on 20 December 2023. The parents also appealed that decision, but permission to appeal was refused by the Supreme Administrative Court on 23 January 2024.
- 6 On 17 February 2024, the parents were permitted to depart from Sweden and they arrived in London on 12 March 2024, the mother having been granted a temporary visa.
- 7 At the hearing on 11 April 2024, the father informed the court that the English Central Authority, ICACU, had requested a report on the situation of Y from the Swedish Central Authority, pursuant to Art 32 of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (hereafter ‘the 1996 Convention’). In response to the direction of the court, ICACU confirmed that it had requested a report on the situation of Y from the Swedish authority pursuant to Art 32 and the court has now been provided with a copy of that report, which has also been disclosed to the parents. The report received by ICACU, dated 6 February 2024, is authored by the Social Administration of Linköping. That report, and the documents that accompany it, paints a *very* different picture to that presented by the parents to this court in their application form, at the hearing on 11 April 2024 and in the father’s statement. In particular:
 - a. The report records that the parents are wanted in Finland in connection with the death of Y’s sibling due to neglect. The parents informed the Swedish social authorities that they had travelled to Sweden to avoid being tried in Finland. (The father informed the court during the course of his oral submissions today that he remains a suspect in Finland with respect to the death of Y’s sibling).
 - b. A decision to take a child away from their family under the Swedish Care of Young Persons (Special Provisions) Act must be based on there being a significant risk of harm to the child’s health or development.
 - c. At the time Y was removed from the care of the parents, the parents were leading a nomadic and precarious existence, avoiding involvement with social services, health authorities, and the police. The family were located in a supermarket car park with their belongings in a car.
 - d. The parents committed criminal offences in Sweden whilst having care of Y and had stolen money from a grocery store despite there being large amounts of cash in their vehicle.
 - e. At the time she was taken into care in December 2023, Y was wearing only pyjamas and was dirty. Y had severe eczema and badly damaged teeth, for which the parents had not sought medical treatment, placing Y at risk of harm.
 - f. A decision was made by the Social Administration of Linköping to take Y into immediate care in accordance with section 6a of the Care of Young Persons (Special Provisions) Act 1990. That decision was upheld by the Administrative Court of Linköping and, following assessment indicating that the statutory requirements were met, an application was made to the Administrative Court to provide Y with care.

- g. A hearing in the Administrative Court of the Social Administration's application for an order authorising it to provide Y with care was pending and listed for 20 February 2024.
- h. Y was placed in foster care and was now thriving, had put on weight and was receiving treatment for her eczema and dental damage. The parents objected to Y receiving standard vaccinations.
- i. The parents showed no insight into their failure to care properly for Y nor acknowledged that they caused the death of Y's sibling through neglect. They, likewise, showed no understanding as to why the Social Administration of Linköping considered that Y required a placement outside the family and the need to make changes before Y was able to return to their care.
- j. The extended family of Y do not agree with the Social Administration's assessment of risk for Y for being returned to the care of her parents.

8 During the course of his oral submissions, the father informed the court that the parents dispute the contents of the Art 32 report and sought to make submissions on those matters. The father, however, further confirmed that the matters on which the parents rely in that regard (for example, with respect to the allegation that when taken into care Y was wearing only pyjamas, was dirty, and had severe eczema and badly damaged teeth) have been raised by the parents before the courts in Sweden, the parents having, as I have noted, appealed to the Administrative Court of Jonköping in December 2023 and Supreme Administrative Court to January 2024. As I have noted, those appeals were unsuccessful.

9 The Art 32 report confirms that Y has also been the subject of proceedings before the Migration Court in Sweden. The document exhibited to the report includes a statement, dated 6 February 2024 made by legal counsel to the Social Administration of Linköping and directed to the Swedish Migration Authority. That statement, whilst recognising that the Social Administration of Linköping does not have competence in matters properly within the remit of the Swedish Migration Agency, asserts that Y requires care-givers who consistently meet her needs. The Social Administration relates that its assessment is that Y requires a placement in a residential setting before transition to foster care. The Social Administration further asserts that there are considerable risks attendant on Y being further uprooted at this point, given her presentation and emotional needs.

10 With respect to the possibility of Y being deported from Sweden, the Social Administration of Linköping stated in its statement as follows:

“If the Swedish Migration Authority were to decide that Y should be deported to China or Hong Kong, the Board also sees risks with the journey itself. As the Board has previously stated in a statement to the Swedish Migration Agency, Y cannot currently travel with her guardians under any circumstances. In the event of a trip becoming relevant, Y will, as a result, have to travel with people who are completely unknown to her. Given Y's background of being kept away from public authorities and contact with other people, the Board is, therefore, very concerned about how the trip may affect Y.”

11 In the foregoing context, in its statement to the Migration Board, the Social Administration of Linköping asserted that it is not in Y's best interests to deviate from the care plan drawn up by the Social Administration and urged the Migration Board to give special consideration

to what Y's health and development and best interests require, pursuant to Chapter 1, Section 10 of the Alien's Act, to carry out a thorough child impact assessment prior to its decision, to have regard to the fact that China is not a signatory to the 1996 Hague Convention and to await the outcome of the hearing before the Administrative Court of the Social Administration's application for an order authorising it to provide Y with care, due to take place on 20 February 2024.

- 12 At the hearing before this court on 11 April 2024, the parents showed the court a decision of the Swedish Migration Board, dated 17 February 2024, refusing Y's residence permit and requiring Y to leave Sweden either by way of travel to Hong Kong, China or another country prepared to receive her. During the course of his oral submissions, the father confirmed that the Migration Board has attached conditions with respect to Y's travel, specifically, that she is not permitted to travel with her parents under *any* circumstances.
- 13 It was plain from the father's oral submissions that the parents continue to litigate in the jurisdiction of Sweden with respect to Y. In addition to having attempted to appeal the conditions attached by the Migration Board to Y's travel, the father informed the court that the parents are at present seeking to appeal the renewal of the order authorising the Social Administration of Linköping to provide Y with care, such order requiring to be renewed every six months. It was also apparent that the parents have, as recently as this month, made an application to the District Court in Stockholm for a summary return order in respect of Y under the 1980 Hague Convention on the grounds that she has been unlawfully retained in the jurisdiction of Sweden. Perhaps unsurprisingly, that application was not entertained by the Swedish court.
- 14 Finally, by way of background, pursuant to a direction made by Peel J on 26 March 2024, the court has also received a Position Statement from the London Borough of Camden setting out its position in relation to Y. That Position Statement confirms that Camden has had no involvement with the family and that it has received no request from the Swedish authorities with regard to Y. The Position Statement appears to suggest that the parents informed the local authority that Y's sibling had died from a "congenital infection". It would also appear that the parents informed the local authority that examination of the deceased child did not raise any concerns regarding the child being harmed in any way by the parents, with no concerns around physical abuse, and that it was not felt by the authorities that the child died because of parental abuse or neglect. That information is not consistent with that contained in the Art 32 report to which I have referred.
- 15 The parents do, however, appear to have confirmed to the local authority that the Finnish authorities took the decision to prosecute the parents in relation to the death of Y's sibling. The Position Statement of the local authority confirms that the documents available to the local authority suggest that the Swedish authorities had concerns as to the care of Y by the parents, particularly with regard to her physical health.
- 16 The parents now argue before this court that, notwithstanding that they continue to litigate in Sweden with respect to Y and in circumstances where Y herself remains in Sweden and has never been to this jurisdiction, that this court has jurisdiction to make orders in respect of Y based on her habitual residence in England and Wales. From the skeleton arguments prepared by them, the parents argue that this court can find Y is habitually resident in this jurisdiction based on the following matters:
 - a. Y was prevented from accompanying her parents to the jurisdiction of England and Wales due to circumstances beyond the parents' control, namely the fact that Y's

birth could not be registered in Finland, denying her travel documents, and the fact that Y was taken into care in Sweden.

- b. There is no requirement that Y has to be present in the jurisdiction of England and Wales before the court can find she is habitually resident in this jurisdiction. In this regard, the parents rely on the decision of the Supreme Court in *Re A*.
 - c. The parents intended always to bring Y to the jurisdiction of England and Wales to live with them, which means, by reason of that parental intention, she is habitually resident in the jurisdiction of England and Wales.
 - d. Y is wholly dependent on her parents and her parents have a degree of integration in a social and family environment in England sufficient to establish habitual residence, meaning Y is also habitually resident in England.
 - e. In the foregoing context, the circumstances in this case are so exceptional that habitual residence can be established notwithstanding that Y is not present, and has never been present, in this jurisdiction.
- 17 Were the court to be persuaded that it has jurisdiction, the parents' position in their application, and initially before the court, is that the court should order the relevant authority in this jurisdiction (likely to be the London Borough of Camden) to facilitate the return of Y to this jurisdiction and assume the care of Y in the interim or, in the alternative, that the court should make an order against ICACU to take those steps. When the court indicated to the parents during the hearing that it did not consider that it had the power to order a local authority to return a child from a foreign jurisdiction and take a child into care, or to order ICACU to effect the return of a child to this jurisdiction, the father submitted that the court should order the summary return of Y to the care of the parents. It remained unclear against whom such an order would be made, although the parents appeared to appreciate that this court has no power to make orders against foreign authorities.

RELEVANT LAW

- 18 The law governing whether this court has jurisdiction in respect of a child is well-settled. In this case, the parents contend that this court has jurisdiction in respect of Y based on habitual residence. The law the court must apply in determining habitual residence is equally well-settled. Habitual residence is the primary connecting factor by reference to which jurisdiction in respect of children is determined, based on the degree of connection between the child and the state in question, described by Lord Wilson in *Re B (A Child) (Reunite International Child Abduction Centre Intervening)* [2016] AC 606 as “the internationally recognised threshold to vesting in the courts of that State of jurisdiction to determine issues in relation to him or her.”
- 19 In determining whether a child is habitually resident in the jurisdiction, in *J v E (Habitual Residence)* [2024] EWHC 196 (Fam) this court observed as follows, at [87] and onwards:

“[87] Where then does this plethora of authority on the concept of habitual residence leave the busy judge who is required to determine the preliminary issue of jurisdiction, without that determination ‘becoming an unworkable obstacle course, through which the judge must pick his or her way by a prescribed route or risk being said to have made an unsustainable finding?’ Reading the foregoing authorities together, it is tolerably clear that the task of determining

habitual residence falls to be discharged by the court asking itself whether, having regard to all the relevant circumstances and as a matter of fact, the subject child has achieved a degree of integration in a social and family environment in the country in question sufficient for the child to be habitually resident there. That is the test I have adopted in this case.

88. The authorities further make clear that in deciding in a given case whether the degree of integration is sufficient to establish habitual residence, i.e. whether the 'some' is enough, certain matters may inform the court's global analysis of the child's situation in, and connections with, the state in which he or she is said to be habitually resident for the purpose of determining whether a sufficient degree of integration exists. These non-exhaustive considerations, to paraphrase Lord Wilson in *Re B (A Child) (Reunite International Child Abduction Centre intervening)*, may include the following:

- (i) the factual inquiry is centered throughout on the circumstances of the child's life that are most likely to illuminate his or her habitual residence. It is the child's habitual residence which is in question and the child's integration which is under consideration.
- (ii) The meaning of habitual residence 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.
- (iii) It is not necessary for a child to be fully integrated in a social and family environment before becoming habitually resident.
- (iv) The requisite degree of integration can, in certain circumstances, develop quite quickly. It is possible to acquire a new habitual residence in a single day. There is no requirement that the child should have been resident in the country in question for a particular period of time.
- (v) It is the stability of a child's residence as opposed to its permanence which is relevant. This is qualitative and not quantitative, in the sense that it is in the integration of the child into the environment rather than a mere measurement of the time a child spends there.
- (vi) Relevant matters can include the duration, regularity and conditions for the stay in the country in question; the reasons for the parents move to and the stay in the jurisdiction in question; the child's nationality; the place and conditions of attendance at school; the child's linguistic knowledge; the family and social relationships the child has; whether possessions were brought; whether there is a right of abode; and whether there are durable ties with the country of residence or intended residence.

- (vii) Where there are competing jurisdictions advanced as to the child's habitual residence, the comparative nature of the exercise requires the court to consider the factors which connect the child to each State where they are alleged to be habitually resident.
- (viii) Where there are competing jurisdictions advanced as to the child's habitual residence, the circumstances of the child's life in the country he or she has left as well as the circumstances of his or her life in the new country will be relevant. What is important is that the court demonstrates sufficiently that it has in mind the factors in the old and new lives of the child, and the family, which might have a bearing on the subject child's habitual residence.
- (ix) The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his or her achievement of that requisite degree.
- (x) In circumstances where all of the central members of the child's life in the old state have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, where any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residence.
- (xi) In circumstances where the social and family environment of an infant or young child is shared with those on whom he or she is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned. In respect of a pre-school child, circumstances to be considered will include the geographic and family origins of the parents who effected the move.
- (xii) A child will usually, but not necessarily, have the same habitual residence as the parent(s) who care for her. The younger the child the more likely that proposition but this is not to eclipse the fact that the investigation is child focused.
- (xiii) Parental intention is relevant to the assessment, but not determinative. There is no requirement that there be an intention on the part of one or both parents to reside in one country in question permanently or indefinitely. Parental intent is only one factor, along with all other relevant factors, that must be taken into account when determining the issue of habitual residence. 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.”

20 Where a child is habitually resident in this jurisdiction, the court will have jurisdiction to make certain orders in the exercise of its inherent jurisdiction, as defined by s. 1(1)(d) of the Family Law Act 1986. Section 2(3) of the 1986 Act provides as follows:

“(3) A court in England and Wales cannot make a section 1(1)(d) unless –

(a) it has jurisdiction under the Hague Convention, or

(b) the Hague Convention does not apply, but –

(i) the condition in section 3 of this Act is satisfied, or

(ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection.”

21 The condition in s. 3 of the Family Law Act 1986 referred to in section 2(1)(b)(ii) is that, on the relevant the date, the child is habitually resident in England and Wales or is present in England and Wales and is not habitually resident in any other part of United Kingdom or specified dependent territory. It is important to note, however, that whilst habitual residence provides the court with jurisdiction to make orders in the exercise of the court’s jurisdiction with respect to children, section 1(1)(d) of the Family Law Act 1986 proscribes the exercise of that jurisdiction by specifying that such orders are orders giving the care of a child to any person, or providing contact with, or the education of, the child. As confirmed by the Supreme Court in *Re A (Children)* [2013] UKSC, a return order does not fall within the scope of section 1(1)(d) and the jurisdiction to make such orders is not to be found in the jurisdictional provisions of s.2 of the 1986 Act.

22 The parents contend that this is the position with respect to the “voluntary return order” that they seek from the English court. But that is not, as the parents’ skeleton argument would have it, the end of the jurisdictional analysis. Jurisdiction cases concerning children is now governed by two pieces of legislation.

23 First, the Family Law Act 1986. As noted in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* [2014] AC 1, the principal purpose of the Family Law Act 1986 is to provide a uniform scheme for the jurisdiction, recognition and enforcement of custody and related orders as between the three different jurisdictions of the United Kingdom, albeit the jurisdictional rules created by the Family Law Act 1986 also apply as between the jurisdiction of the United Kingdom and other countries. The second piece of applicable legislation is the 1996 Hague Convention. The 1996 Hague Convention is incorporated into domestic law by the Private International Law (Implementation Agreements) Act 2020. Within that context, the 1996 Hague Convention is, following the departure of the United Kingdom from the European Union, now directly implemented in domestic law by amendments made to the Civil Jurisdiction and Judgments Act 1982 by section 1 of the Private International Law (Implementation Agreements) Act 2020. Sweden and is also a party to, and has ratified, the 1996 Hague Convention.

24 As this court noted in *London Borough of Hackney v P* [2022] EWHC 1981 (in a conclusion that was not disturbed by the Court of Appeal in *Hackney LBC v P (Jurisdiction: 1996 Hague Child Protection Convention)* [2023] Civ 1213), where the order being sought does not fall within the scope of Family Law Act 1986, as in that case public law orders under Part IV of the Children Act 1989 did not, the starting point when determining the question of jurisdiction is the 1996 Hague Convention. In *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* the Supreme Court made clear in a case concerning Council Regulation EC 2022/2003, but equally applicable to cases concerning the 1996 Hague Convention, as follows:

“20. Thus, if the order in question is a Part I order, the first port of call is the Regulation. But if it is not a Part I order, and is an order relating to parental responsibility within the meaning of the Regulation, the first port of call is also the Regulation, because it is directly applicable in United Kingdom law.”

25 In the circumstances, if the order sought by the parents (assuming for the present purposes, and contrary to my ultimate conclusion, it is an order that the court has the power to make if jurisdiction is established) was a Part I order, then the starting point in determining jurisdiction in respect of Y would be the 1996 Hague, Convention, pursuant to section 3(a) of the Family Law Act 1986. If, however, the order sought by the parents (and, again, assuming for the present purposes, and contrary to my ultimate conclusion, it is an order the court has the power to make if jurisdiction is established) is not a Part I order and therefore the jurisdictional provisions of the 1986 Act do not determine the question of jurisdiction, as made clear by the Supreme Court in *Re A (Children)*, the starting point will remain the 1996 Hague Convention, in circumstances where it is directly applicable in United Kingdom law. The same conclusions apply to the more conventional return order that the parents ultimately sought from the court during their oral submissions if the court does not have the power to grant them the “voluntary return order” originally sought.

26 With respect to jurisdiction, Art 5 of the 1996 Hague Convention defines when a contracting state will have jurisdiction by reference to the connecting factor of the habitual residence of the child. Art 5 of the 1996 Hague Convention provides as follows with respect to the basis of jurisdiction under the Convention:

“(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child’s person or property.

(2) Subject to Article 7, in case of a change of the child’s habitual residence to another Contracting State the authorities of the State of the new habitual residence have jurisdiction.”

27 Finally, with respect to the applicable legal principles in this case, whilst they make certain assertions in their Skeleton Argument regarding the operation of the British Nationality Act 1981, s. 3 of the Hong Kong (British Nationality) Order 1986 and the British Overseas Territory Act 2022, and contend that the United Kingdom should have conferred British citizenship on Y, those matters are not justiciable by this court on this application. In the circumstances, on the evidence before the court, it is not open to the parents to pursue either of the two alternatives bases for jurisdiction, namely the presence of Y in the jurisdiction or, exceptionally, jurisdiction of the court based on the nationality of the child, as confirmed by the decision of the Supreme Court in *A v A and another (Children: Habitual Residence)*

DISCUSSION

- 28 Having considered carefully the documents in this matter and the oral submissions helpfully made by the father, I am satisfied that this court does not have jurisdiction to make orders in respect of Y under the inherent jurisdiction of the High Court. In the circumstances, I am satisfied that the parents' application must be dismissed for want of jurisdiction. My reasons for so deciding are as follows.
- 29 The court cannot help but be extremely concerned in respect of Y's welfare. Whilst it would not be appropriate for this court to make findings in respect of the matters set out in the Art 32 report provided in respect of the standards of the parents' care of Y, it is at least apparent that both the Finnish and Swedish authorities held grave concerns regarding the parents' care, the former considering that the parents were responsible for the death of Y's sibling in Finland. It is further important to note that, notwithstanding the duty of candour falling on litigants who seek relief from this court on a without notice basis, these matters were not dealt with in the statement of evidence provided to this court by the father. Against these matters and, again, whilst not a matter on which this court can pass comment, notwithstanding the representations of the Social Administration of Linköping it would appear that the Swedish Migration Board has made the decision to deport Y to another country that will receive her, with a condition that she should not travel with her parents under any circumstances. It would therefore appear that, as matters stand and as far as the Swedish authorities are concerned, Y is neither able to return to the care of her parents or to remain in the jurisdiction of Sweden, albeit the father informed the court during his oral submissions that Y does have a lawyer acting on her behalf in Sweden.
- 30 Notwithstanding these very concerning circumstances, the stark question for this court is whether it has jurisdiction to make orders in respect of Y. On the evidence before the court, the answer to that question is clear. I am satisfied that none of the bases on which the court could have jurisdiction in respect of Y are made out in this case.
- 31 For the reasons I have already given, jurisdiction is governed in this case by Art 5 of the 1996 Hague Convention, none of the other jurisdictional provisions of Chapter 2 of the 1996 Hague Convention being applicable in this case. In the circumstances, this court will only have jurisdiction in respect of Y if it can be said that she is habitually resident in the jurisdiction of England and Wales.
- 32 Habitual residence is the question of fact centering on Y's circumstances. Y is not at present in this jurisdiction and has never been present in this jurisdiction. Whilst the parents submit that the decision of the Supreme Court in *A v A and another (Children: Habitual Residence)* (*Reunite International Child Abduction Centre and others intervening*) is authority for the proposition that a child can be habitually resident in a country without ever having been in that country, that point was, in fact, left undecided in *A v A*. The decision of the court in *A v A* was that jurisdiction could be exercised in that case on the basis of the inherent jurisdiction of the High Court if the child was a British national, whilst the question of whether presence was a necessary precursor to habitual residence was left open. In any event, even if it might be possible in certain circumstances for a child to be habitually resident in a place he or she has never been, whether that is the position in an individual case remains a question of fact to be determined on all the circumstances of the particular case.

- 33 Once again, Y is not present in this jurisdiction and she has never been to this jurisdiction. Whilst in *A v A* Lord Hughes stated at [92] that “If current physical presence is not essential, then so also can habitual residence exist without any physical presence yet having occurred, at least if it has only been prevented by some kind of unexpected force majeure”, this is not a case in which Y’s presence in this jurisdiction has been prevented by extraordinary circumstances beyond the reasonable control of the parents. Rather, on the evidence currently before the court, Y was prevented from being present with her parents in this jurisdiction by reason of her birth not being able to be registered in Finland, meaning she could not secure travel documents, and by her being removed from the care of the parents by the child protection authorities in Sweden due to allegations of parental neglect and concerns regarding the risk presented to Y by the parents’ previous neglect of a sibling, who allegedly died as a result of that neglect. Those matters do not constitute extraordinary circumstances beyond the parents’ control but, rather, circumstances that, on the face of it, derive from the parents’ own actions.
- 34 Whilst I accept that the parents are now in this jurisdiction, and whilst it is the case that where the social and family environment of an infant or young child is shared with those upon whom he or she is dependent it is necessary to assess the integration of the parents in the social and family environment in the country concerned, Y no longer shares a social and family environment with her parents by reason of her being taken into care in Sweden. Rather, Y now shares a social and family environment, for the time being, with her current carers in Sweden. In the circumstances, even if the social and family integration of the parents in this jurisdiction could be described as habitual since 12 March 2024 having regard to their particular circumstances, the question of Y’s habitual residence is no longer totally dependent on her parents and their social and family integration in this jurisdiction.
- 35 Within that context, and focusing the necessary factual inquiry on the circumstances of Y’s life, it being Y’s integration which is under consideration, Y remains in care in Sweden, with her physical, emotional and educational needs being met by her substitute carers in that jurisdiction. Whilst the parents dispute this, there is no evidence before the court that, as the parents would have it, Y is being “tortured” in care in Sweden. In these circumstances, in addition to not being present in this country and having never been here, Y has no practical connection with this jurisdiction. Y is not a British national. The court has been provided with no evidence that Y has family and social relationships in this jurisdiction beyond those with her parents. It is also not clear whether Y’s possessions have been transported to this jurisdiction and there is no evidence that Y currently has a right of abode in this jurisdiction, albeit the parents contend that Y is entitled to a British National (Overseas) visa to enable her to enter the United Kingdom. As matters stand, Y has no durable ties with the jurisdiction of England and Wales.
- 36 Finally, the parents contend that it was their intention to bring Y to England when they travelled to this jurisdiction, albeit that they were prevented from doing so by what they assert were exceptional circumstances. Whilst it may well be the case that the parents intended to come to this jurisdiction with Y, in the circumstances I have described parental intention is insufficient by itself to ground a finding of habitual residence.
- 37 Having regard to all these matters, I am not satisfied that Y can remotely be said to have achieved a degree of integration in a social and family environment in England and Wales sufficient for the court to find as a fact that she is habitually resident in this jurisdiction. Rather, I must and do conclude on the evidence that Y is not habitually resident in the jurisdiction of England and Wales. As I have noted, on the evidence before the court it is not open to the parents to pursue either of two alternate bases for jurisdiction in circumstances where Y is neither present in the jurisdiction of England and Wales, nor a British citizen. In

the circumstances, I am satisfied there is no basis upon which this court could assume jurisdiction to make orders in respect of Y.

- 38 Finally, even were the court to have jurisdiction in respect of Y, the “voluntary return order” that the parents submit the court should make is not a species of order known to law in this jurisdiction. It is well-established that this court has no power to compel a local authority to take a child into care. I am equally satisfied that this court has no power to compel a local authority to take steps to recover a child from a foreign jurisdiction. The same applies with respect to ICACU. Whilst the parents moderated their case with respect to the order they seek, settling on a conventional return order made under the inherent jurisdiction, they were not able to specify against whom such an order should be made. In any event, even were the court to be able to overcome the significant forensic hurdles to concluding that such an order would be in Y’s best interests in the circumstances described in this judgment, for the reasons I have given I am satisfied that the court does not have jurisdiction to make such an order in circumstances where Y is not habitually resident in the jurisdiction of England Wales.

CONCLUSION

- 39 In the circumstances, I find that the court has no jurisdiction in respect of Y. I dismiss the parents’ application for want of jurisdiction and make no order as to costs.