This judgment was delivered in private. In any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral Citation Number: [2024] EWHC 1411 (Fam)

Case No: FD24P00735

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2024

Before :

Ms V Butler-Cole KC

- -

Between :

ZZ	**Applicant**
- and -	
AA	**Respondent**

- -
- -

Ms Andrews (instructed by **Avery Naylor**) for the applicant
The respondent did not appear and was not represented

Hearing date: 22 May 2024

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 6th June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MS V BUTLER-COLE KC

Ms Victoria Butler-Cole KC:

1. I am concerned with an application by Mr ZZ for orders under the inherent jurisdiction of the High Court for the return of his two sons, CA (aged 10) and CB (aged 5) from India, where they have been since 1 September 2023. The respondent to the application is Mr ZZ's wife and the children's mother, Ms AA. Mr ZZ was represented at this hearing by Ms Andrews. Ms AA was not represented and did not attend.

2. Mr ZZ is of Pakistani origin but was granted indefinite leave to remain in the UK in 2014 and British citizenship in 2016. He states that due to his possession of a Pakistani origin document, he is not able to obtain a visa to travel to India.

3. Ms AA is an Indian national but was granted indefinite leave to remain in the UK in 2023. In October 2023, she was invited by the Home Office to attend a naturalisation ceremony within three months, but she has not taken up this invitation and so retains her Indian citizenship. Mr ZZ and Ms AA met shortly after Ms AA moved to the UK in 2006. In 2009 they moved to City W. They married in 2011 in a religious ceremony in Saudi Arabia and held a civil ceremony in City W in 2012. The children were born in 2014 and 2018.

4. Mr ZZ says that in around 2022, his wife caught covid, and thereafter became anxious and depressed, and was unable to care for the children. In late 2022, he says that Ms AA withdrew their eldest child from school, and instead enrolled him and his brother in an online school based in England in January 2023. Later in 2023, Ms AA said that she intended to go to India to spend some time with her family and to enable the children to visit India for the first time. Mr ZZ was in agreement with this plan.

5. Mr ZZ says that on 31 August 2023, he drove his wife and his children, and his wife's sister AB who had been staying with them in City W, to the airport for a trip to India. He was aware they did not have a return flight booked, but he expected them to be back in City W in November. He was aware that the children's visas expired in early November, and on around 4 November asked Ms AA to confirm when their flight back was arriving. He was told that she had applied to extend the visas so they could stay longer, and Mr ZZ agreed to this, although he was surprised to discover that his wife had taken the children's birth certificates with her and had all the necessary documents to make the visa application from India. In due course, Ms AA confirmed

that visa extensions had been granted to 14 February 2024 and that they would return shortly before that date.

6. From September to January, Mr ZZ had frequent video calls with his sons. He says that in the later part of that period, they told him that they missed him and wanted to come home. On 28 January, having not heard from his wife for two weeks, Mr ZZ received a call in which she said that she was not coming back to City W and that she had issued proceedings in the Indian courts, and would now only communicate with Mr ZZ through her solicitors.

7. The next day, Mr ZZ received a court summons from India, requiring his presence at a hearing on 29 February 2024 regarding an application for guardianship of the children. The application had been filed on 3 November 2023. Mr ZZ had one further video call with his children on 10 February 2024 but has not seen or spoken to them since. Mr ZZ contacted the online school the children had been enrolled with while in City W, and was told that they had been withdrawn from the program in the November or December 2023. He later realised that his wife had taken all of their wedding jewellery with her, and his personal hard drive which he used to back up his laptop. He says that he offered to his wife that if she returned with the children he would move out of the family home and support them, but she refused. He then issued his application on 22 February 2024.

8. So far as I am aware, no substantive orders have been made in the Indian proceedings. A hearing that took place on 29 February 2024 in India which Mr ZZ attended remotely was ineffective as there was no judge available. A further hearing on 10 May was also ineffective and the next hearing date is 3 September 2024.

9. On 23 February 2024, Mr David Rees KC sitting as a deputy High Court Judge made an order without notice to Ms AA, which granted permission for documents to be served on her electronically, and required her to file a statement setting out her position by 27 February 2024. A remote hearing was listed for 28 February 2024. Ms AA did not attend that hearing – the order incorrectly recites that it was made without notice to her, but correctly states that Mr ZZ had effected service on her of the order of Mr Rees KC by WhatsApp, and that Ms AA had failed to comply with the court's directions. Ms Hannah Markham KC declared on a provisional basis that the children were habitually resident in the jurisdiction of England and Wales on the date they were removed to India and had been wrongfully retained in the jurisdiction of India

without the consent of Mr ZZ. The court directed that the children should be made available for video contact with their father at least twice a week. The children were made wards of court. Ms AA was directed to file a statement by 5 April 2024 and a remote hearing was listed for 12 April 2024.

10. At the hearing on 12 April 2024 before Macdonald J, Ms AA did not appear. She had sent the court a letter dated 4 April 2024 setting out her position that she disputed the court's jurisdiction, and that the appropriate forum for determining the children's welfare was India. She opposed any order requiring her to return the children to England and Wales. The matter was listed to determine jurisdiction and forum conveniens on 22 May 2024 – that is the hearing I have conducted and in respect of which this judgment is given. Both parents were directed to file statements setting out their case. Mr ZZ complied with that order; Ms AA did not.

11. I determined that the hearing before me on 22 May 2024 should proceed in Ms AA's absence. Mr ZZ confirmed that details of the hearing had been sent electronically to Ms AA, using the same method that had previously been successful (demonstrated by the fact of Ms AA's letter of 4 April addressing the matters that had been directed by Ms Markham KC). I was satisfied that notice had been effected, and that Ms AA had apparently chosen not to attend the hearing or to comply with the court's directions. I was also satisfied that there was no purpose in adjourning the hearing for further attempts to engage Ms AA to be made, and that it was in the children's interests for the court to deal with the preliminary elements of Mr ZZ's application promptly.

12. I therefore heard oral submissions only from Ms Andrews and read the documents in the court bundle.

Orders sought

13. In her position statement, Ms Andrews on behalf of Mr ZZ sought the following relief:

    a) a declaration that the courts of England and Wales have jurisdiction to determine the father's application for the return of the children from India;
    b) a declaration that this jurisdiction is the appropriate forum to make determinations about the children's welfare more generally;
    c) that the children remain Wards of Court;

d) a Hemain injunction against the mother, until further order;
e) continuation of the order requiring interim contact with the children by way of video calls twice per week:
f) permission given to disclose the order from this hearing to the Indian authorities;
g) the application for a return order to be listed for a final hearing.

14. Ms Andrews proposed during oral submissions that the court could decide whether to make a return order at this hearing. I declined to do so, as the hearing had been listed to deal with jurisdiction and forum conveniens only, and, notwithstanding her lack of engagement, it would not have been fair to Ms AA to expand the scope of the hearing on the day. Ms Andrews agreed that the application for an injunction could sensibly be adjourned until the hearing of the return order application, the next hearing in the Indian courts not being until 3 September 2024.

15. I am therefore dealing in this judgment with two central questions:

    a. Does this court have jurisdiction to entertain Mr ZZ's application?
    b. If it does, which is the appropriate forum for the dispute between the parents to be determined?

16. I have decided that the court does have jurisdiction, on the basis that both children were habitually resident here on 22 February 2024, the date of Mr ZZ's application, and that Article 5 of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 Convention') applies. I have further decided that the appropriate forum for the issues to be determined is England and Wales.

Applicable legal framework - jurisdiction

17. The order sought for the return of the children can be framed either as a specific issue order under s.8 Children Act 1989 or as an order pursuant to the inherent power of the High Court (see **Re NY (A Child)** [2019] UKSC 49). If it is a s.8 order, then in the factual scenario relevant to this case, Part 1 of the Family Law Act 1986 applies such that the court has jurisdiction only if it has jurisdiction under the 1996 Convention, or if the child is habitually resident in England and Wales (s.1(1)(a), s(2)(1) and s.(3) FLA 1986).

18. Under the 1996 Convention, this court has jurisdiction, as a Contracting State, if the child is habitually resident here. Article 5(1) provides that "*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*."). This is so notwithstanding that India is not a Contracting State (**Re A (A Child)(Habitual Residence: 1996 Hague Child Protection Convention)** [2023] EWCA Civ 659).

19. The relevant date for determination of habitual residence pursuant to the FLA is the date of the application being made (s7(c) FLA 1986). The date of the application is also the relevant date for the purposes of the 1996 Convention (**London Borough of Hackney v P (Jurisdiction: 1996 Hague Child Protection Convention)** [2023] EWCA Civ 1213.

20. If the children were habitually resident in this jurisdiction on 22 February 2024 but have since become habitually resident in India, then this court will only have jurisdiction under the 1996 Convention if the provisions of Article 7 of the 1996 Convention concerning wrongful removal are satisfied. There is a lack of clear authority as to whether Article 7 can be invoked at all where the children have been removed to a non-Contracting State. But in that case, I would not need to consider Article 7 as the habitual residence requirement under the FLA would remain satisfied. Arguments as to Article 7 only come into play if I find that the children's habitual residence had changed to India before 22 February 2024. As that is not my finding, I do not propose to address the arguments made by Ms Andrews in respect of Article 7 in this judgment.

Habitual residence

21. The primary question I have to determine is the habitual residence of the children as at 22 February 2024. I have considered and applied the guidance of the Court of Appeal in **Re A**. Habitual residence corresponds to the place which reflects some degree of integration by the child in a social and family environment, but the presence of some degree of integration is not determinative. There must be a sufficient degree of integration, which is a question of fact that requires a global analysis of all relevant information about the child's circumstances. These may include the child's life prior

to moving country and following the move, the reasons for their stay, their nationality, their schooling, their linguistic knowledge, and their family and social relationships. The intentions of the parents are relevant to the global analysis, but they are not determinative.

22. Lord Wilson's 'expectations' in **Re B** [2016] UKSC 4, cited with approval in **Re A**, are pertinent in the circumstances of this case:

> *"(a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;*
>
> *(b) 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 achievement of that requisite degree; and*
>
> *(c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."*

23. The following factors are in my view relevant to the question of the habitual residence of CA and CB on 22 February 2024:
    a. Both boys are British citizens. They were born in City W and have lived there for their whole lives. They speak English as their first language. CA attended primary school in City W for over four years and had friends in City W. They had a stable life in City W and were fully integrated into their community prior to the trip to India.
    b. The children had been cared for by both parents, living as a family together. Mr ZZ has provided a letter from the head teacher of the primary school that CA attended which confirms that Mr ZZ was the school's main point of contact. Mr ZZ says that he provided the majority of the care to the boys in 2021-22 when their mother was unwell and after that arranged his work shifts so that he was able to be a part of their daily routines.
    c. Neither child had ever visited India previously. They met their aunt AB for the first time when she visited and stayed with them for around 2 months immediately before they went to India. They had not met their other relatives in India.

d. The trip to India was, so far as the boys were aware, a short term holiday. They had visas that expired in November 2023. They remained enrolled in their online school based in England until November or December 2023. Their visas were subsequently extended to mid-February, but as Mr ZZ has not provided consent to any further extension, it appears they may not have a lawful basis to remain in India.

e. Ms AA is staying with her sister, and, according to Mr ZZ's understanding, her sister's husband and adult daughter, and another sister. The documents I have seen include an Indian document described as 'Article 35(i) Lease – Rent deed up to 1 year', and a 'Rent Agreement' which say that Ms AA's sister has agreed to let out part or all of her property in Delhi to Ms AA for 10,000 rupees a month rent, for eleven months from 1 September 2023 to 31 July 2024. The Rent Agreement is dated 1 November 2023 and says that AB had '*let out the above premises to '[Ms AA] on dated 01.09.2023 but due to some reasons the parties could not executed the Rent Agreement at that time, therefore now the parties are executing this Agreement' (sic)*. Either party can terminate the agreement on one month's notice.

f. No advance arrangements were apparently made for the children to enter into schooling in India. Ms AA's documents for the Indian proceedings state that she has '*secured them an admission in Birla Brainiacs in Collaboration with Birla Open Minds International School'*. No further information is given. The Birla Brainiacs website suggests it is a provider of online learning.

g. The children have now been present in India for nearly 9 months. It is not clear what they have been told about why they have not returned to City W, or whether they have been told they will be remaining in India.

24. There is very little evidence from Ms AA about the children's lives in India. As set out, I do not know if they are attending school, whether they have made friends, what activities they do, and whether they know that they are staying in India indefinitely. Although the boys had been in India for 6 months at the time Mr ZZ issued his application, it is my view, balancing all the considerations I have identified, that they remained habitually resident in the country where City W is located at that time. Their move to India was anticipated to be temporary and was not pre-planned in any meaningful sense. The children had a stable and secure life in City W and have left behind one of their parents who cannot travel to India easily or at all. There is little or no evidence as to their degree of integration into the family and social environment in New Delhi, beyond the fact that they are living with relatives. It is not clear that they

are presently in India lawfully given that their visas expired in February, before Mr ZZ's application was issued. The only information Ms AA has supplied is that the children have '*thrived emotionally and psychologically in India, where they feel safe and have established supportive networks"*. This is not sufficient to discharge the burden of demonstrating a change in habitual residence, in all the circumstances.

Applicable legal framework - forum conveniens

25. The court therefore has jurisdiction under both the 1996 Convention by application of Article 5, and the FLA. The next question is whether India is a more appropriate place for the determination of applications in connection with the welfare of the children. I adopt the summary of the applicable legal principles set out by Williams J in **V v M (A Child) (Stranding: Forum Conveniens: Anti-Suit Injunction)** [2019] EWHC 466 (Fam); [2019] 4 WLR 38. S.5 of the FLA provides that the court may stay an application for a Part 1 order if there are proceedings with respect to the matters to which the application relates continuing in another jurisdiction, and it would be more appropriate for those matters to be determined in that other jurisdiction.

32. The principles to be applied are those deployed in the exercise of the inherent jurisdiction to stay non-family proceedings' In the Matter of Re K (a child) (international child abduction: forum conveniens) [2015] EWCA Civ 352, [2015] All ER (D) 100 (Apr), per Mcfarlane LJ at [27. The leading authorities remain

i) Spiliada Maritime Corpn v Cansulex Ltd [1987] AC 460, [1986] 3 All ER 843, HL, and

ii) De Dampierre v De Dampierre [1988] AC 92, [1987] 2 All ER 1, HL

33. In Lubbe v Cape plc [2000] 4 All ER 268, [2000] 1 WLR 1545, HL., the principles were summarised by Lord Bingham of Cornhill:

> *"... the court's first task is to consider whether the defendant who seeks a stay is able to discharge the burden resting upon him not just to show that England is not the natural or appropriate forum for the trial but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is had to the fact that jurisdiction has been founded in England as*

of right (see the Spiliada case [1986] 3 All ER 843 at 855, [1987] AC 460 at 477). At this first stage of the inquiry the court will consider what factors there are which point in the direction of another forum (see the Spiliada case [1986] 3 All ER 843 at 855, [1987] AC 460 at 477; Connelly v RTZ Corp plc[1997] 4 All ER 335 at 344, [1988] AC 854 at 871). If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, that is likely to be the end of the matter. But if the court concludes at that stage that there is some other available forum which prima facie is more appropriate for the trial of the action it will ordinarily grant a stay unless the plaintiff can show that there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this second stage the court will concentrate its attention not only on factors connecting the proceedings with the foreign or the English forum (see the Spiliada case [1986] 3 All ER 843 at 856, [1987] AC 460 at 478; Connelly's case [1997] 4 All ER 335 at 344–345, [1988] AC 854 at 872) but on whether the plaintiff will obtain justice in the foreign jurisdiction. The plaintiff will not ordinarily discharge the burden lying upon him by showing that he will enjoy procedural advantages, or a higher scale of damages or more generous rules of limitation if he sues in England; generally speaking, the plaintiff must take a foreign forum as he finds it, even if it is in some respects less advantageous to him than the English forum (the Spiliada case [1986] 3 All ER 843 at 859, [1987] AC 460 at 482; Connelly v RTZ Corp plc[1997] 4 All ER 335 at 345, [1988] AC 854 at 872). It is only if the plaintiff can establish that substantial justice will not be done in the appropriate forum that a stay will be refused (the Spiliada case [1986] 3 All ER 843 at 859, [1987] AC 460 at 482; Connelly v RTZ Corp plc[1997] 4 All ER 335 at 345, [1988] AC 854 at 873). This is not an easy condition for a plaintiff to satisfy, and it is not necessarily enough to show that legal aid is available in this country but not in the more appropriate foreign forum."

34. *The decision is not a paramount welfare decision but the child's best interests are a relevant consideration: Re S (residence order: forum conveniens) [1995] 1 FLR 314; Re V (forum conveniens) [2004] EWHC 2663 (Fam), [2005] 1 FLR 718, Munby J. It is arguable that the best interests of the child are a primary consideration pursuant to UNCRC, Art 3.1 [2016] UKSC 15. Having regard to*

the logic of the decision of the Supreme Court in Re N in relation to the meaning of 'best interests' in Article 15 BIIa transfer cases it is likely that 'best interests' in the forum context should also be applied broadly so as to encompass not only 'procedural' best interests but also substantive best interests.

35. *Drawing those threads together the approach that the court needs to take in a forum conveniens situation is it seems to me as follows;*

i) the burden is upon the applicant to establish that a stay of the English proceedings is appropriate;

ii) the applicant must show not only that England is not the natural or appropriate forum but also that the other country is clearly the more appropriate forum;

iii) in assessing the appropriateness of each forum, the court must discern the forum with which the case has the more real and substantial connection in terms of convenience, expense and availability of witnesses. In evaluating this limb the following will be relevant;

a) the desirability of deciding questions as to a child's future upbringing in the state of his habitual residence and the child's and parties' connections with the competing forums in particular the jurisdictional foundation;

b) the relative ability of each forum to determine the issues including the availability of investigating and reporting systems. In practice judges will be reluctant to assume that facilities for a fair trial are not available in the court of another jurisdiction but this may have to give way to the evidence in any particular case;

c) the availability of witnesses and the convenience and expense to the parties of attending and participating in the hearing;

d) the availability of legal representation;

e) any earlier agreement as to where disputes should be litigated;

f) the stage any proceedings have reached in either jurisdiction and the likely date of the substantive hearing;

g) principles of international comity, insofar as they are relevant to the particular situation in the case in question. However public interest or public policy considerations not related to the private interests of the

parties and the ends of justice in the particular case have no bearing on the decision which the court has to make;

h) it has also been held that it is relevant to consider the prospects of success of the applications.

iv) If the court were to conclude that the other forum was clearly more appropriate, it should grant a stay unless other more potent factors were to drive the opposite result; and

v) In the exercise to be conducted above the welfare of the child is an important (possibly primary), but not a paramount, consideration.

Forum conveniens

26. There are proceedings underway in India in which Ms AA has sought guardianship of the children and has made a range of allegations of domestic abuse including daily physical violence against her and multiple instances of physical violence against the children, as well as threats of assault including throwing acid on her and the children. In the documents from the Indian proceedings that I have seen, she alleges that this behaviour started within a month of their marriage. She also alleges that Mr ZZ financially exploited her, taking her money to send to his family members. Specific allegations are made in respect of a stay in Pakistan with Mr ZZ's family who live there, but the bulk of the allegations concern life in City W over the past ten to twelve years.

27. I have assumed that the Indian courts are capable of deciding whether the allegations are true, and making appropriate welfare decisions through a process that enables both parents to participate and be represented. Although Mr ZZ would be in difficulty attending court hearings in India in person, due both to immigration requirements and the practicalities, it appears that he will be permitted to participate remotely, although I do not know whether that permission extends to hearings at which oral evidence is given. Ms AA could attend court in this jurisdiction as she has indefinite leave to remain, but would also encounter practical difficulties given the cost of travel. She has to date been permitted to attend hearings remotely. It may be a little more difficult for the views of the children to be obtained and presented to this court, given their location, than it would be in India.

28. This family had, until September 2023, shared their lives together in City W. The allegations made by Ms AA largely concern events in City W and none concern events in India. Evidence from police, the NHS, social services, and professionals involved in the lives of the children, as well as friends of the family, will all come from City W. In contrast, the only witness in India is likely to be Ms AA's sister who spent 2 months with the family in City W in 2023.

29. Ms AA contends that she could not obtain legal representation in this jurisdiction as it is too expensive, but has not provided any details of the costs of her representation in India, and in any event, may be entitled to public funding if her allegations of domestic abuse were pursued.

30. The Indian courts have not made any substantive orders, and have not, so far as I am aware, considered the question of the legality of the children's continued stay in India despite the expiry of their visas.

31. Drawing the above together, I have concluded that Ms AA has not discharged the burden of showing that this is not an appropriate forum, or that India would be more appropriate. Ms AA's primary concern is that the Indian courts should deal with her application so that the children do not have to return to City W. It does not follow automatically from a decision that England and Wales is the more appropriate forum for disputes to be resolved that the children would be required to return to City W or to the care of Mr ZZ. That issue will be determined at the next hearing in this matter.

Conclusion

32. I will therefore declare that the children CA and CB were habitually resident here at the time of Mr ZZ's application and refuse Ms AA's application for a stay on the basis of forum conveniens.

33. I will give directions for provision of this judgment and court orders to the court in India, and for disclosure from the children's GP and local authority relevant to the allegations made by Ms AA. The matter will be listed for determination of Mr ZZ's application for a return order.