Neutral Citation Number: [2024] EWHC 3105 (Fam)

Case No: FD24P00197

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 October 2024

Before :

MR JUSTICE CUSWORTH

- -

Between :

W — **Applicant**

- and –

S — **Respondent**

- -
- -

The **Applicant** acting in person
Dr O Momoh (instructed by **Stowe Family Law**) for the **Respondent**

Hearing dates: 15 - 17 October and 6 November 2024

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JUDGMENT

This judgment was handed down remotely at 10.30am on 4 December 2024 by circulation to the parties or their representatives by e-mail and by release to The National Archives.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) 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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Cusworth :

1. **Background.** The applications before me concern A, a girl born on 21 March 2020 (so now 4 years and 6 months old). A's parents are the applicant father and the respondent mother. The parents are both Chinese citizens, who were born and raised there. They both have families there. They met in Cambridge in December 2015 and married in China in January 2017. A, however, is a British citizen.

2. In December 2019, the parties purchased the family home at [redacted] with funding from the extended families in China – the majority it is agreed from the mother's side. Other than during the COVID pandemic, the parties usually then travelled back to China once a year. A's first language, whilst living in Cambridge, was Chinese (Mandarin), but she would also have had fluent English. Both parents would want her to become truly bilingual.

3. In December 2023, the parties had planned to travel to China to visit family. However, at that time A became unwell, and was initially misdiagnosed in the UK as having Type A Flu. The father raised a complaint with Cambridge Addenbrooke's Hospital for the misdiagnosis. By Christmas, A continued to remain unwell with a high fever. The planned trip to China went ahead however, with the mother, paternal grandfather and A travelling to China on 25 December. On arrival, she was admitted to the Qingdao Women and Children's Hospital, and subsequently diagnosed with Kawasaki disease. She remained in hospital for a week. Kawasaki disease is described as a rare heart condition that causes high fever and inflammation in the blood vessels throughout the body. It can also affect the blood vessels supplying the heart muscle (coronary arteries) requires long term follow up care with a paediatrician. A has continued to have medical checks every 3 months, the last I am told having been in July 2024.

4. In early January 2024, the Mother postponed a planned return trip to the UK with A, as her condition had stabilised, but she remained on treatment. The father was updated about A's treatment and regular video calls took place. However, by this stage the parent's relationship had reached a point of breakdown. On 12 January 2024 the father records that the mother called saying that she wanted to divorce.

She insisted that A would stay with her in China. On 20 January 2024, the mother sought the father's consent for A to remain in China until secondary school. The mother states that she assured him that his and A's 'relationship was strong' and that she 'would not deny him good quality time with his daughter'. The father asked her to put this in writing. The mother also says that the parties then commenced negotiating the terms of a divorce.

5. Significantly, it is the mother's case that during the relationship, the father was emotionally abusive towards her, and had a temper, at one stage saying that she found herself having to 'kneel down in front of him to stop him from saying more terrible words'. She adds that after the birth of A when grandparents visited, the situation became better, but A was still exposed to the father's behaviour, and 'that her dad was always angry'. On the other hand, the father, who denies that any behaviour of his in the relationship amounted to abuse, accuses the paternal grandfather of himself being prone to bursts of anger, most recently when they had a physical altercation in Cambridge in August 2024, which led to the grandfather receiving a police caution. I will deal with the impact of these cross-allegations below.

6. In February 2024, the father travelled to China and remained there for about 6 weeks. Video calls continued between A and her father, but he did not travel to the mother's home town – a distance of around 500 miles, or 7 hours by train - to see A face to face. He says that he did try to make those arrangements, but that the mother would not agree. The mother told the father of her plans to return to the UK in February, to enable her to apply for indefinite leave to remain in the UK, and also (in a somewhat stark contradiction) to give in her notice at her English place of work. Her intention, she now says, was to secure her status in the UK to enable her to travel freely with A for visits with the father, notwithstanding her decision that the marriage was at an end and that, at least for the foreseeable future, she intended to stay in China with A**.**

7. In February, the mother approached an immigration lawyer to apply for indefinite leave to remain, and returned to the UK without A for that purpose, whilst the father was still in China. The parties fell out over the mother's planned application, as the

father expressed himself unwilling to support it if in fact their marriage was at an end. At this stage, the mother's UK visa was due to expire on 10 May 2024. The mother sees this as the father seeking to exert control over her; the father says that he was simply concerned to follow the rules and not support an application under false pretences.

8. On 5 March 2024, the mother sent the father a draft agreement with detailed terms for consideration. It was entitled "Divorce settlement Agreement (Draft)". In brief it recorded that:
    a. The mother would have custody of A
    b. She would resign for her job in the UK and return to China with her. In support of this she cited:
        i. A's relatively weak health
        ii. Differences in medical service efficiency and living standard between the UK and China, which may not be beneficial for her
    c. A would attend an international school in China until the conclusion of middle school, then (depending on her preference) 'they may opt to attend High School in the UK'.
    d. The parents would share A's educational, living and medical expenses equally
    e. The father could visit A at any time, provided he didn't interrupt her 'education and daily life'
    f. The father must cooperate in assisting the wife to obtain permanent UK residency (enabling annual summer or winter trips to the UK and educational visits). If not, the mother would not be obligated to facilitate the child's visits to the UK.
    g. Provision for the division of the parties' property and other assets. The wife would buy out the husband's interest in their Cambridge property (on the basis of his 12.24% financial contribution). A second property in Nottingham would go to the husband.

9. These terms were not accepted, and further discussions followed over the next weeks. The mother complained that the father blew hot and cold over supporting

the mother's application for permanent leave to remain, but nonetheless, she duly did have her application granted, with the father's support, on 15 April 2024.

10. Different arrangements were then discussed, and the mother says that a final decision on where A would live would be made after considering how she has settled down in China this year. She further accepts that it was agreed that the mother would take A to the UK to visit the father in the summers, and specifically, after further discussion in late April, that she would be brought over in August 2024.

11. Subsequently, the mother accuses the father of saying things to A which upset her during a video call on 27 April 2024. What then happened was that, without the father knowing, A, her mother and the maternal grandmother came to the UK on 6 May 2024 to stay for some days so as to achieve a renewal of A's Chinese visa. There then followed an unfortunate incident on the next day at the Cambridge house when the father came to the property and unexpectedly came upon the maternal family there. There was an altercation when the father tried to push his way in, and the mother says that the maternal grandmother was hurt in blocking the door. Both sides called the police. No doubt that could all have been avoided if the mother had provided the father with advance notice of the trip.

12. Thankfully, an arrangement was then made for the father to see A on 9 May, but again led to the mother later complaining that the father said unfortunate and unhelpful things to her during the visit – specifically, she says, 'you must have suffered a lot, look what kind of awful people you live with'. The maternal party returned to China with A on 10 May 2024, and on the following day, the father says that the mother told him that she would not bring A back to the UK. On 14 May, the mother issued divorce proceedings in China which were accepted by the court on 27 May. On 23 May 2024 the father had issued his application here under the inherent jurisdiction for wardship and return orders in relation to A.

13. On 7 June 2024, the first case management hearing took place before HHJ Vavrecka (sitting as a deputy High Court Judge). The court was made aware of the concurrent divorce proceedings issued by the mother in China and deferred consideration of the issues of jurisdiction, *forum conveniens*, and the need for a

welfare report, until the next hearing, directing statements from the parties. On 24 June at the second case management hearing Arbuthnot J determined that the evidence required in this case need not include a wishes and feelings (Cafcass) report. The mother's anticipated and now filed relocation application (dated 17 July 2024) was also to be considered at this final hearing.

14. Regrettably, a further incident then occurred between the families. On 2 August 2024, the maternal grandfather attended the former matrimonial home in Cambridge (he says, believing it to be vacant). However, this led to an argument about keys to the property and a physical altercation between the maternal grandfather and the father on 3 August. I have been shown videos filmed by both sides showing the aftermath of this incident. What is clear is that, before the videos were taken, the paternal grandfather had assaulted the father, grabbing him round the neck, and that he subsequently accepted a police caution as a consequence of the attack.

15. At this final hearing, which has come before me over 15 to 17 October 2024, there have therefore been two applications to be determined:

    a. The father seeks a return order for A (from China) under the inherent jurisdiction; and
    b. The mother seeks permission to permanently relocate (to China) with consequential child arrangements to be made in respect of time spent with the Father.

16. The father has attended this final hearing as a Litigant in person, the mother (who has had permission to attend remotely from China and has been partially assisted by a Mandarin interpreter) has been ably and sensibly represented by Dr Momoh of counsel. In light of the mother's allegations of domestic abuse within the marriage, it was agreed in court that when the mother gave her evidence, by video-link, the father's questions of her were written down by him and put to the mother by me, which is what has happened. No other special measures were sought, or thought necessary. I have heard oral evidence from both parties and submissions from counsel for the mother and from the father in person. Whilst I have read a statement from the maternal grandfather, I have not heard any evidence from him.

There has been no input from CAFCASS into the case, which, given A's age, and her current location in China, I consider appropriate.

17. **The Law**. Whilst both applications have at their core an assessment of A's best interests in the context of her welfare generally, it will be helpful to identify the relevant rules, and the case law where the tests that I should apply have been considered and restated.

18. PD 12J the Family procedures Rules 2010, *Child Arrangements & Contact Orders: Domestic Abuse and Harm* ('PD12J') (as updated in May 2022) provides at [2] that:

"The purpose of this Practice Direction is to set out what the Family Court or the High Court is required to do in any case in which it is alleged or admitted, or there is other reason to believe, that the child or a party has experienced domestic abuse perpetrated by another party or that there is a risk of such abuse."

It then sets out at [4] that:

"Domestic abuse is harmful to children, and/or puts children at risk of harm, including where they are victims of domestic abuse for example by witnessing one of their parents being violent or abusive to the other parent, or living in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with and being victims of domestic abuse and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents."

Non-Convention Abduction

19. *In re J (Children returned Abroad: Convention Rights)* [2005] UKHL 40; [2005] 5 FLR 802 Baroness Hale set out the general principle:

> 25. …in all non-Convention cases, the courts have consistently held that they must act in accordance with the welfare of the individual child. If they do decide to return the child, that is because it is in his best interests to do so, not because the welfare principle has been superseded by some other consideration… The Court of Appeal, in *Re P (A Minor)(Child Abduction: Non Convention Country)* [1997] Fam 45 has held that the Hague Convention concepts are not to be applied in a non-Convention case. Hence, the first two propositions set out by Mr Justice Hughes in this case were entirely correct: the child's welfare is paramount, and the specialist rules and concepts of the Hague Convention are not to be applied by analogy in a non-Convention case.

> 26. …the court does have power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits…
>
> 28. …there is always a choice to be made. Summary return should not be the automatic reaction to any and every unauthorised taking or keeping a child from his home country. On the other hand, summary return may very well be in the best interests of the individual child.

20. Lord Wilson in the case of *Re NY (A Child) (Reunite International and others intervening*) [2020] AC 665 said this as to the applicability of the welfare checklist and of PD12J:

> 48. Of course, when in each of the proceedings it is considering whether to make a summary order, the court will initially examine whether the child's welfare requires it to conduct the extensive inquiry into certain matters which it would ordinarily conduct. Again, however, it would be wrong for that initial decision to be reached in a significantly different way in each of them.
>
> 49. The mother refers to the list of seven specific aspects of a child's welfare, known as the welfare check-list, to which a court is required by section 1(3) of the 1989 Act to have particular regard…In its determination of an application under the inherent jurisdiction governed by consideration of a child's welfare, the court is likely to find it appropriate to consider the first six aspects of welfare specified in section 1(3) (see *In re S (A Child) (Abduction: Hearing the Child)* [2014] EWCA Civ 1557, [2015] Fam 263, at para 22(iv), Ryder LJ); and, if it is considering whether to make a summary order, it will initially examine whether, in order sufficiently to identify what the child's welfare requires, it should conduct an inquiry into any or all of those aspects and, if so, how extensive that inquiry should be.
>
> 50. The mother also refers to Practice Direction 12J, which supplements Part 12 of the 2010 Rules and which is entitled "Child Arrangements and Contact Orders: Domestic Abuse and Harm"… as in relation to the welfare check-list, a court which determines such an application is likely to find it helpful to consider the requirements of the Practice Direction; and if it is considering whether to make a summary order, it will initially examine whether, in order sufficiently to identify what the child's welfare requires, it should, in the light of the Practice Direction, conduct an inquiry into the allegations and, if so, how extensive that inquiry should be.

21. In *S v S* [2014] EWHC 575, Theis J considered the legal principles to be applied to in non-Hague summary return cases as follows:

> "(1) Any court which is determining any question with respect to the upbringing of a child has a statutory duty to regard the welfare of the child as its paramount consideration. In non-convention cases the court must act in accordance with the welfare needs of the particular child.

(2) There is no basis for the principles of the Hague Convention being extended to countries which are not parties to that convention.
(3) A power did remain in accordance with the welfare principle to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits.
(4) A trial judge had to make a choice, having regard to the welfare principle, between a summary return or a more detailed consideration of the merits of the parties' dispute.
(5) In making that choice the focus must be on the individual child and the particular circumstances of the case.
(6) It was wrong to say that there should be a 'strong presumption' that it is 'highly likely' to be in the best interests of a child subject to an unauthorised removal or retention to be returned to his country of habitual residence so that any issues which remain can be decided there. The most one could say was 'that the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case. What may be best for him in the long run may be different from what will be best for him in the short run. It should not be assumed…that allowing a child to remain here while his future is decided inevitably means he will remain here for ever'.
(7) A number of factors were relevant, amongst all the circumstances of the case, in deciding whether to order a summary return or not:-

(a) The degree of connection of the child with each country – what is his home country?
(b) The length of time he has spent in each country
(c) Depending on the facts of the case, any differences in the legal system of this country and the other country, including whether the other country had an absence of a relocation jurisdiction
(d) Impact of any decision on the child's primary carer."

(8) Any decision about whether to order a summary return or not should be taken swiftly."

The Relocation application

22. In so far as the Relocation application is concerned, notwithstanding its utility in considering the return order sought, the court will always have in mind the statutory checklist set out at s1(3) of the Children Act 1989, which includes:

i. *The ascertainable wishes and feelings of the child (considered in light of her age and understanding)*
ii. *Her physical, emotional and educational needs*
iii. *The likely effect of any change in her circumstances*
iv. *Her age, sex, background and any characteristics of hers which the Court considers relevant*
v. *Any harm which she has suffered or is at risk of suffering*
vi. *How capable each of her parents and any other person in relation to whom the Court considers the question to be relevant is of meeting her needs*
vii. *The range of powers available to the Court under the Children Act 1989*

23. In *Re TC and JC (Children: Relocation)* [2013] EWHC 292 (Fam), Mostyn J identified the following principles as underlying relocation cases generally:

> 11. …doing the best I can, I set out shortly what seem to me to be the presently governing principles …for a relocation application:
>
> i) The only authentic principle to be applied when determining an application to relocate a child permanently overseas is that the welfare of the child is paramount and overbears all other considerations, however powerful and reasonable they might be.
>
> ii) The guidance given by the Court of Appeal as to the factors to be weighed in search of the welfare paramountcy, and which directs the exercise of the welfare discretion, is valuable. Such guidance helps the judge to identify which factors are likely to be the most important and the weight which should generally be attached to them, and, incidentally, promotes consistency in decision-making.
>
> iii) The guidance is not confined to classic primary carer applications and may be utilised in other kinds of relocation cases if the judge thinks it helpful and appropriate to do so.
>
> iv) The guidance suggests that the following questions be asked and answered (assuming that the applicant is the mother):
>
> a) Is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?
>
> b) Is the mother's application realistically founded on practical proposals both well researched and investigated?
>
> c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
>
> d) Is the father's opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?
>
> e) What would be the extent of the detriment to him and his future relationship with the child were the application granted?
>
> f) To what extent would that detriment be offset by extension of the child's relationships with the maternal family and homeland?
>
> v) Since the circumstances in which such decisions have to be made vary infinitely and the judge in each case has to be free to decide whatever is in the best interests of the child, such guidance should not be applied rigidly as if it contains principles from which no departure is permitted.
>
> vi) There is no legal principle, let alone some legal or evidential presumption, in favour of an application to relocate by a primary carer. The old statements which seem to favour applications to relocate made by primary carers are no more that a reflection of the reality of the human condition and the parent-child relationship.

vii) The hearing must not get mired in taxonomical arguments or preliminary skirmishes as to what label should be applied to the case by virtue of either the time spent with each of the parents or other aspects of the care arrangements.

24. Subsequently, in *Re C (Internal Relocation)* [2015] EWCA Civ 1305, Vos LJ (as he then was) made clear that:

82. …in cases concerning either external or internal relocation the only test that the court applies is the paramount principle as to the welfare of the child. The application of that test involves a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it is not statutorily applicable. The exercise is not a linear one. It involves balancing all the relevant factors, which may vary hugely from case to case, weighing one against the other, with the objective of determining which of the available options best meets the requirement to afford paramount consideration to the welfare of the child. It is no part of this exercise to regard a decision in favour or against any particular available option as exceptional.

25. In the same case, Bodey J provided the following concise summary:

85. …the proper approach to the whole issue of relocation may be stated in summary as follows:

a) There is no difference in basic approach as between external relocation and internal relocation. The decision in either type of case hinges ultimately on the welfare of the child.

b) The wishes, feelings and interests of the parents and the likely impact of the decision on each of them are of great importance, but in the context of evaluating and determining the welfare of the child.

c) In either type of relocation case, external or internal, a Judge is likely to find helpful some or all of the considerations referred to in *Payne v Payne* [2001] 1 FLR 1052; but not as a prescriptive blueprint; rather and merely as a checklist of the sort of factors which will or may need to be weighed in the balance when determining which decision would better serve the welfare of the child.

26. In *GT v RJ* [2018] EWFC 26, Mostyn J added the following:

2. The legal test to be applied is now very straight-forward. It is the application of the principle of the paramountcy of the children's best interests, as taxonomised by the checklist in section 1(3) of the 1989 Act. That principle is not to be glossed, augmented or steered by any presumption in favour of the putative relocator. Lord Justice Thorpe's famous "discipline" in *Payne v Payne* [2001] 1 FLR 1052 is now relegated to no more than guidance, guidance which can be drawn on, or not, as the

individual case demands. In fact, most of the features of that guidance are statements of the obvious…

3. It is said that in trying these cases the court must undertake a "global" or "holistic" or "360 degree" exercise, which again to my mind is to state the obvious. Plainly, the court is not going to undertake a partial or superficial or limited or incomplete survey of the case.

Habitual Residence

27. In *Re B (A Minor : Habitual Residence)* [2016] EWHC 2174 (Fam), Hayden J set out a comprehensive precis of the propositions which emerge from the jurisprudence in relation to this issue. He said:

16. Both counsel have, in their respective Skelton Arguments, analysed the evolution of the Supreme Court case law extensively and with characteristic skill…

17. I think that [Counsel]'s approach is sensible and, adopt it here, with my own amendments:

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*);
viii) …[omitted - see *Re M (Children: Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105]
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);

18. If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven...

28. **Determination.** So, applying the principles which underly all of those decisions, what is the right order for this court now to make in face of the parent's applications? I have firstly considered whether, in fairness to A, I can now make final welfare based decisions in this case in the absence of more investigation or report. It is unusual for the court to determine a relocation application without some investigation or analysis by CAFCASS, even if only discussing with A in an age appropriate way her views of her family and any wishes and feelings which she may be able to express. Given her age here, and given the practical situation in which the court finds her, living now with her mother in China for 9 ½ months, however, I am satisfied that an adjournment of this decision for such an enquiry would not have been proportionate or helpful. Whilst there is clearly high emotion on both

sides of her family, I have no reason to believe that she is not currently happy and well-looked after by her mother, but that, subject to the question of the abuse allegations which I deal with below, she will be missing more regular and direct contact with her father and the wider paternal family.

29. The mother describes a strong bond between the extended family on both sides, and it is acknowledged that the grandparents regularly took turns to travel to and live with the parties to assist with caring for A. The paternal grandmother certainly lived with the parties for an extended period during the COVID lockdown, and will therefore be an important person in A's life. It must also be remembered that, of all of her family, and despite her British nationality, the only member of her family who now lives in the UK is her father. The whole of the rest of her family are in China, albeit some 500 miles apart in their respective home towns, Hefei and Qingdao.

30. It is also an unusual feature of this case that the mother makes an application for permission to relocate with A, notwithstanding the fact that that move has already happened, and that apart from the brief unfortunate visit in May, A has not been present in this country since Boxing Day last year. In so far as the question of her habitual residence is relevant to the issues before me – probably more jurisdictionally than substantively – it is clear that, prior to 26 December 2023, she was habitually resident here, living with both of her parents. Her trip then was for a combination of reasons: visiting her maternal family and also have a second medical opinion which fortunately accurately diagnosed her illness and has set her on the path to recovery. But it is clear from the subsequent discussions between her parents that there was not then between them any settled agreement as to where her future lay.

31. In those circumstances, I am satisfied that, during those debates, it is most unlikely that A had already lost her previous habitual residence in the UK, and acquired a new one in China. Her residence there then cannot in the absence of agreement have acquired sufficient stability to have become habitual, in my judgment. Indeed, the fact of the mother's July 2024 application for an order permitting her relocation to China must reflect her acceptance that, at least for some time, A's habitual residence

would have remained in the UK, despite her mother's expressed plan for her to stay in China for a period of years.

32. I do not need to determine with precision when A's habitual residence is likely to have changed for the purposes of the applications before me, given the welfare based nature of the enquires in this case under both applications. However, by about the time of her last visit in May, to remedy her visa position, it is likely that her degree of settlement will have been such that she will have become habitually resident in China. There can be little issue that she is so resident there by now, after 9 ½ months fully integrated into the maternal family and into the Chinese education system.

33. It is also relevant to consider the reality of her position now that she is habitually resident in China, but that she remains a British citizen about whose welfare both her parents are seeking remedies from the English Court. I have heard no expert evidence of Chinese law, but have been referred by Dr Momoh to the decision of Baker J (as he then was) in *Re DO & BO (Temporary Relocation to China)* [2017] EWHC 858 (Fam), where he provided the following helpful exposition of the relevant position in Chinese law, in addition to dealing with other questions of nationality:

> '47. The parties jointly instructed Ms Flora Huang, of the Shanghai Promise Law Firm, to provide an expert report on aspects of Chinese law. The original letter of instruction posed the following questions.
>
> (1) What legal remedies, if any, are available to the father and the English court should the children be wrongfully retained in China by the mother?
>
> (2) What legal remedies, if any, would the father have, pursuant to Chinese domestic law?
>
> (3) Are there any international conventions or agreements by which the Chinese courts would either recognise or enforce an order made by an English court?
>
> (4) Would the Chinese court make an order in the same terms as an English order, or is there a mechanism by which the Chinese court would "mirror" an English order?
>
> (5) Would the answers to (1) to (4) above be different if the children have dual British and Australian citizenship?...
>
> 49. In answer to the first question, Ms Huang advises that, at present, there is no legal basis for the unconditional recognition and enforcement of an English family court judgment

or order in China. Chinese law calls only for the recognition and enforcement of the divorce element, if any, of a foreign family judgment. The child custody, support and asset division elements of such a judgment would not be recognised by, or enforceable through, the Chinese courts.

50. If the children were not returned to the UK after the holiday, Ms Huang advises that the father's primary legal option would be to bring a case before a Chinese court of competent jurisdiction pleading for the return of the children to their country of habitual residence. Such proceedings would take the form of a hearing de novo of the child custody issues with a fresh determination being made according to Chinese law and practice. Ms Huang explained that the principal aim of the Chinese courts when deciding child custody and related matters is the protection and promotion of the child's health and well-being. She identified other principles applied by the Chinese courts by reference to an opinion issued by the Supreme People's Court. She added, however, that, although British judgments and/or orders will not be recognised and enforced by the Chinese courts, they may be entered as evidence in the Chinese proceedings.

51. Ms Huang confirmed China is not a signatory to the Hague Child Abduction convention, nor to the 1996 Hague Child Protection Convention. She further confirmed that the UK and China have not concluded any relevant bilateral agreements on the mutual recognition and enforcement of family law judgments.

52. Ms Huang further advised that the Chinese courts will not issue a "mirror image" order without investigating first the substantive aspects of the case in accordance with Chinese law. In practice, this would entail a full redetermination of the child custody matters in China, adjudicated according to Chinese law. Ms Huang confirmed that the answer to this question, and the preceding three questions, would not be materially affected by reason of the fact that the children have dual UK and Australian citizenship.

53. In respect of the fifth question, Ms Huang stated that, as the mother is at present a Chinese citizen, a sufficient connection to China exists to satisfy the relevant Chinese jurisdictional requirements for starting a case in that country. As a result, both the mother and the father have the right to start proceedings in China in relation to the children. By default, litigation in China will be conducted in the Chinese language and with the application of Chinese law. It will be possible for the parties to request that the court apply English law, but Ms Huang advised that the Chinese courts were most unlikely to agree to such an application. She further advised that the mother will be able to apply to the Chinese courts with respect to the children on the basis of her Chinese citizenship, regardless of the fact that she is habitually resident in the UK. If she were to abandon her Chinese citizenship, however, she will be able to apply to the Chinese courts in respect of the children only after successfully completing one year of uninterrupted residency on which to found jurisdiction. Furthermore, China does not have any legal mechanism to apply for or issue urgent or emergency orders in family law cases.'

34. For the purposes of this judgment I am proceeding on the basis that the advice which Baker J received in that case remains accurate, and consequently that any future proceedings in relation to A whilst she remains habitually resident in China, and any proceedings to attempt to enforce any orders of this court, would need to take the form of a fresh application before the courts in China, by which the court might consider the order of this court as evidence, but would certainly not be bound to follow it. However, given the underlying principle at the heart of the decision would be '*the protection and promotion of the child's health and well-being',* the court's enquiry would be welfare based.

35. In those circumstances, I must be aware that the return order which the father asks me to make would, if I were satisfied that it were appropriate, be of no more than evidential value to him in any subsequent proceedings that he would be obliged to pursue in China. However, I can say with confidence that this is not a father, from the evidence that I have heard and read, who has ever unequivocally consented to A's permanent removal from this jurisdiction to China. Whilst he did support and encourage her journey at the end of last year for a visit, and on medical grounds, he was not then aware that the ending of his marriage to the mother was imminent; had he been, he may have required her to make her application prior to the removal taking place.

36. Both parents, I am satisfied, did their best to give me truthful evidence from their respective perspectives. For neither is English their first language, but they both gave their evidence in English, although there was an interpreter available for the mother. The father represented himself ably, and gave his evidence honestly. Whilst the mother's evidence was more difficult to assess, given that she was speaking over a video-link, I was satisfied that she too was doing her best to tell me the truth from her own perspective. It is clear that the breakdown of the parent's marriage has caused them both significant distress. I do take seriously the allegations of emotional and attempted control which the mother makes, but my assessment of the father is not that he is naturally aggressive or manipulative. Rather, I find that he is something of a stickler for rules, and the right way of doing things, and also that when presented by the mother with her wish to divorce, and to remain in China with A, he did become upset, and angry at what he saw as something of a manipulation

of the system by her. It was clear to me that he was doing his best to consider A's position from her own perspective, but was confounded by the mother's comprehensive attempts to tie up a deal on all matters to her satisfaction, as the price for her future cooperation over matters such as facilitating international visiting arrangements. I do not find that the father has been overly controlling in the negotiations since December 2023.

37. As to the two altercations, the first happened when the father visited the house in Cambridge in May to find the mother and A within. At this point he had not seen his daughter since December, when she had been very ill. It is not surprising that he got upset when not allowed in to see her, although it is regrettable that he apparently pushed at the door with sufficient force to leave the maternal grandmother in some pain. If the mother had given him notice of the trip, the incident could have been avoided. Whilst it is the case that he had indicated in a text that he would not be living in that house, that does not justify the mother bringing A there from China, without letting him know that she was planning to return with A to this country.

38. When in August the paternal grandfather came to the UK, the altercation that followed was both unnecessary and no doubt very damaging to relationships between the two sides of A's family. The grandfather must take the lion's share of the blame, as he appears to have been the aggressor, and accepts as much in his apology written as part of the cautioning process. It does not matter precisely how violent the attack was, it should not have happened, and has caused the already fragile trust between the two sides of the family to essentially completely disintegrate. However, unlike the May incident which must have been upsetting for A, she was not present in August, so need not know of it. While I deprecate the assault, I cannot find that, as the father seeks, there is any evidence that the paternal grandfather is someone who should not have a relationship with A, nor would such a prohibition be either practicable or capable of policing and enforcement. I suspect that the tension inevitably created by these proceedings will also have played a part in leading to tensions at the time running high.

39. I am as explained, satisfied that the father has never consented to A's permanent removal to China, even on the basis, as currently put by the mother, that her

intention remains for A to return to the UK in a few years to continue her schooling here – perhaps in about 5 years. In those circumstances, the father was entitled to pursue his application for a non-Hague return order, notwithstanding the difficult legal situation in China which I set out above. However, whether any order is appropriate on the application will depend on the welfare principles as explained in the authorities, and, if those same principles lead me to the view that I should allow the mother's application for a relocation order, then inevitably, the outcome of his application, notwithstanding the unauthorised and so unlawful retention of A in China, will be that no order will be made.

40. I therefore turn to the mother's application. She has filed a significant amount of evidence about the current arrangements in China, involving all aspects of A's life there, with a plethora of photographs. The father does not suggest that A is not happy and well-cared for by her mother, although, as explained, he does now express reservations about the paternal grandparents following the August incident. The obvious lacuna in the arrangements for her at the moment is any opportunity to see and spend time with her father, other than video-contact which has been happening, and occasionally running over. Whilst the mother deserves credit for allowing that, it does demonstrate that the sooner actual face to face visits can be put in place with her father, the better for A's long-term welfare that would be. So, subject to the question of the maintenance of the relationship with her father, I am entirely satisfied that the arrangements for A's case in China are appropriate, and are now, in October 2024, those into which she is settled and habituated.

41. The mother's proposals for ongoing visits, as set out by her in her second statement, are as follow:

6….I propose that [redacted] spends her school summer holidays of around two months (end of June – end of August) with the applicant in the UK. In addition to this, the applicant visits China every year for at least a month to see his family in Hefei, which is a 5-hour trip from Qingdao or a 1.5 hour flight. The price for tickets between Qingdao and Hefei is c£70 return (train) or £145 (flight). I would suggest that if his visit coincides with her school holiday, he can spend the holidays with her or else if it is during term time, he can see her after school on Friday through to Sunday evening. I would also try to return with [redacted] to the UK during her longer

school breaks, such as Easter or National Day Holidays, so that [redacted] can spend more time with the applicant.

7. I also would wish to continue the twice weekly video calls between the applicant and [redacted] which currently last 50-60 minutes each. I would also encourage additional contact if the applicant chose to return to China for any additional time during the year e.g. to see his family. I recognise that the burden of travel should not always be placed on the applicant, which is why I would be in support of travelling with [redacted] to the UK every school summer holiday. I am aware that this could appear to be complicated at first, but I am confident that these plans are realistic, particularly given that the applicant is a Chinese citizen and travels to China every year to visit his family.

42. It is a great shame that this proposal, made in a statement dated 15 July 2024, did not lead to at the very least an agreement that A should then spend a significant amount of time with her father in the UK during the summer of 2024. It is very sad for both A and the father that they have not physically been in each other's presence at all since that statement was written, and inevitably it gives cause for concern that in the event of an agreement or order giving effect to such an order, the mother might not be willing to comply with its terms. The reality, however, is that in that event, any enforcement of the order would have to take place in China, just as would the enforcement of any return order which this court saw fit to make. And in both cases the applicant would have to start before the court de novo, with the English court order as no more than a piece of evidence.

43. Undoubtedly, what is in A's best interests now is for a period of calm and stability in the wider family relationships which will enable trust on both sides to be re-established. It is extremely important that she has the opportunity as she is growing up to spend time with her father, and to maintain what must be a positive relationship with her paternal grandparents, who sadly witnessed the August incident. I do not consider that making a return order now will have the effect of creating such a period of calm. Indeed, the opposite is likely, with contested proceedings then inevitably following in China, at the end of which the fissures in family relationships may well have become irreparable.

44. Although A is a British citizen, all of her extended family, including both of her parents, are Chinese nationals, and it is inevitable that Chinese is and will remain

her primary culture. Whilst it will be of great value to her to grow up in a bilingual environment, her connections to China and its culture will inevitably remain the strongest influence on her. Provided that she can maintain her relationship with her Chinese father in England and his family in China, I am satisfied that it is in her welfare interests to live with her mother in China for the next years, although I record the mother's expressed intention at this stage that she should ultimately be educated in England when she is a little older. That however will have to be a matter of future consideration and agreement between her parents.

45. I am satisfied that the mother's motivation in making her application, in circumstances where she probably did not need to, given A's current probable habitual residence in China, is not founded on purely selfish motives. The initial removal was by agreement, and was initially motivated by medical concern, no doubt also alongside the repercussions from the breakdown of her relationship with the father. The subsequent decision to retain A in China has always been accompanied by an offer of realistic and appropriately facilitated visiting arrangements. It was regrettable however, that their initial offer was made conditional upon the father's cooperation with the mother's immigration status. Nevertheless, the mother's arrangements for A in China are well-thought through and clearly in her interests. That is of course easier to determine, in circumstances where she has already been living there for over nine months, and is undoubtedly settled. Whilst she may have been equally happy and well cared for in England last year, that is realistically no longer her status quo.

46. Having said that, the move for A will only be in her best interests going forward if it can also be shown practicable for her to maintain a full and beneficial relationship with her father, which at the moment is inappropriately limited. I also find that the father is not motivated by any desire to control the mother or A, but is very concerned to maintain a full relationship with his daughter, as is undoubtedly in her interest. Whilst A is certainly benefitting from her relationship with the maternal family, it is also important for her development and longer term-stability that her relationship with the father and her extended paternal family is also maintained and fostered. Her paternal grandmother in particular has played an important role in her childhood, and A should not be cut off from contact with her.

47. Coming back to the s.1(3) checklist, I do not have any report before me as explained about A's wishes and feelings, given her young age, but is it clear in China from the mothers detailed evidence that her physical and educational needs are being met. As explained, her emotional needs must encompass as full a relationship as possible with the father and his family, which is currently not happening as it should. The change of the move to China is one that has already happened for her, and been absorbed, and indeed the more profound change for her now would be if she were to be returned to England, and lose regular contact with her maternal family. However, she is sufficiently young that she would no doubt absorb such an outcome, and recall her former life with both parents in the UK. The last 12 months will have been disruptive for her, and the lack of time spent with her father will have had a negative effect which should be addressed as fully and comprehensively as possible. I have no doubt that both of A's parents are equally capable of providing suitable care for her, and that there is no reason for arrangements to be affected or curtailed by their respective abilities.

48. With all of that, how should I then exercise the powers available to me? I am as I have said satisfied that A was habitually resident here in England when she consensually travelled with her mother to China in December 2023. Her failure to return to this jurisdiction since, and retention in China by her mother, was not ever agreed or authorised by the father and so was unlawful. However, these are not Hague Convention 1980 proceedings, and the tests that I must apply both to the father's application for a return order and the mother's later application for an order retrospectively authorising her relocation to China are both essentially welfare based.

49. Provided that the arrangements which the mother has proposed for the father and his family to be able to spend time with A are put into immediate effect, then I am entirely satisfied that it is now in A's best interests to remain in China with her mother for the next few years, until such time as there is agreement between the parties, or in default an order is made by the Chinese court, which authorises her to return to live in this jurisdiction for the continuation of her education as both parents currently foresee will be appropriate for her.

50. I recognise that even if I had felt it appropriate to make a return order in this case, its enforcement would have been problematic; but I wish to stress that I have not declined to make to order on that basis. A should be brought up as an international child, able to travel freely between China and any other country in which either of her parents may live from time to time. Although a British citizen, her parents and her wider family are all Chinese, and I am satisfied that it is the country where her most deep-rooted connection will always lie. It is where she is now habitually resident and settled. There is no criticism of the quality of life which she is able to enjoy there. What she lacks currently is the ability to rebuild her meaningful relationship with her father and his family which I hope and expect that the bringing to an end of these proceedings will enable her to enjoy.

51. Consequently, I will make no order on the father's application for a return order, and allow the mother's application for and order permitting A's permanent removal to China, on the understanding that the parents' current plans for her encompass a return to this jurisdiction at a time to be agreed in due course, but probably some 5 years hence, for the purposes of her education. That order will also set out the arrangements for A to spend time with her father that the mother has proposed, which I very much hope and expect will be implemented going forward. However, any further applications in relation to those arrangements will now have to be made to the Family Courts in China.

52. That is my judgment.