THE HONOURABLE MR JUSTICE MACDONALD

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Case No: FD12P01423

Neutral Citation Number: [2015] EWHC 4050 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2015

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

QS **Applicant**

- and -

RS **Respondent**

- -
- -

Mr A. Proctor (instructed by **Lightfoot O'Brien Westcott**) for the **Applicant**
Mr A.G.Perkins (instructed by **Dawson Cornwell**) for the **Respondent**

Hearing dates: 14 & 15 October 2015

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Judgment

MR JUSTICE MACDONALD:

INTRODUCTION

1. In this matter I am concerned with T, a young girl born on the 15th October 2005. The parents of T, certainly in a psychological sense, are QS, the applicant in this matter, and RS, the respondent. I say at this stage, "certainly in a psychological sense," in circumstances where, for reasons I will come to, there is, it transpires, a significant question mark as to the legal status of T *vis-à-vis* her parents. Both QS and RS are British citizens.

2. I am delivering this judgment *ex tempore* on the second day of a three day hearing. I shall in due course direct that a transcript of this judgment is obtained at public expense and I will at that stage correct any infelicitous phraseology, or other errors, before the transcript of the judgment is circulated in its final form.

BACKGROUND

3. The background of this matter must start with T. On the 13th August 2005 T was found abandoned in a Temple, in the Federal Democratic Republic of Nepal. She was estimated to be 14 months old and upon being found she was moved to an orphanage. T's date of birth of the 15th October 2005 is her official designated birth date. Subsequent to T's move to an orphanage in Kathmandu, the mother and the father (as I shall call them) were introduced to T on the 28th July 2006. Thereafter there followed an adoption of T by the mother and father under Nepalese law. I have before me, in the bundle of documents prepared for this hearing, copies of the documentation which indicates that that adoption took place on 10 February 2008 and was completed under the law of the Federal Democratic Republic of Nepal. I have no reason to believe that under the law of that jurisdiction the adoption was anything other than properly constituted.

4. Following their adoption of T the parents moved with her to live in Dubai. When in Dubai T was granted British Citizenship. Again in the documents before me I have a Certificate of Registration dated the 16th September 2008, registering T as a British citizen. The precise circumstances of that registration, and the need to examine further those circumstances, I shall, again, return to.

5. Sadly, following the return of the parents and T to Dubai, in due course the parents' marriage got into difficulties. For the purposes of this judgment I do not at this stage need to go into the precise nature of those difficulties. However, one relevant result of the breakdown of the parents' marriage was that they commenced litigation both in the jurisdiction of Dubai and in the jurisdiction of England and Wales. In Dubai that litigation has concentrated on T, with a case concerning her custody and contact moving all the way from the First Instance Court in Dubai finally to the Dubai Court of Cassation. In this jurisdiction the litigation has involved both divorce proceedings, matrimonial finance proceedings and wardship proceedings before the High Court of England and Wales.

6. The wardship proceedings arose in the following circumstances. On the 10th November 2011, again for reasons that it is not at this point in time necessary to go into in detail, the mother was deported from Dubai. Notwithstanding that deportation, the proceedings in

Dubai concerning T continued. On the 10th May 2012 the first instance Dubai Court gave a ruling in those proceedings. Part of that ruling was that the custody of T was awarded to the mother. The father immediately appealed that decision. However the mother, now in England, and in light of the Dubai court's ruling, came before Pauffley J on the 21st June 2012, without notice to the father, with an application to make T a ward of court.

7. The order that Pauffley J made on that day is set out in the bundle. Pauffley J, upon the basis of an understanding that it was the intention of the court in Dubai that T should live with her mother in England and Wales, made T a ward of court and made a further order that she should be in the care and control of her mother in this jurisdiction. Pauffley J further gave liberty to either parent to apply on notice in relation to that order. The father was served personally at an address in Dubai with those orders on the 10th July 2012.

8. In 2013 the mother travelled to Dubai to see T. Her last direct contact with T was on the 1st June 2013. On the 16th October 2013 the wardship proceedings again came before this court without notice to the father. On that date Bodey J continued the wardship in relation to T, directed that the Passport Office in this jurisdiction issue to the mother a British passport for T and continued the care and control order made by Pauffley J on the 22nd June 2012.

9. Meanwhile the proceedings that the father had instituted in Dubai in relation to T were continuing. On the 26th January 2014 the Dubai Court of Appeal handed down a provisional judgment having heard evidence from both the mother and the father. In relation to the issue of the custody of T the Dubai Court of Appeal upheld the judgment of the first instance Court in relation to the order conferring custody of T on the mother. The father again appealed, this time to the Dubai Court of Cassation; that court being the highest court in the United Arab Emirates. On the 28th April 2014 the Court of Cassation allowed the father's appeal and gave custody of T to the father. The mother sought to appeal this decision but her appeal was dismissed.

10. It is important at this point to make clear what the effect of the judgment of the Court of Cassation in Dubai has been in this case. The effect of that judgment and the orders made by the Court of Cassation has been considered in this case by an expert in Islamic law and the law of the United Arab Emirates, instructed jointly to provide an opinion to the court in these proceedings. The expert in question is Dr Dawoud Sudqi El-Alami. He is a member of the Egyptian Bar Association qualified before the Court of Cassation. He has a PhD in Islamic Law from the University of Glasgow and is a Senior Teaching Fellow and Reader in Islamic Law at the University of Aberdeen.

11. In relation to the effect of the judgment of the Court of Cassation in Dubai, Dr. Sudqi El-Alami makes clear as follows, and I quote (including the emphasis added by Dr El-Alami):

> "**In this case it appears, however, that the courts have chosen to treat the case as if the S's were not the parents of the child and have ruled accordingly.**
>
> The status of T as an adopted child: Islamic law does not allow legal adoption of children in the sense understood in the United Kingdom, as great importance is placed on the establishment of blood lineage. UAE nationals and Muslims of other nationalities are therefore not permitted

to adopt, nor are foreign nationals permitted to adopt children who are UAE nationals. While adoption is not dealt with in the Personal Status Law, the UAE has expressed its position in the form of a reservation to Article 21 (regarding adoption) of the UN Convention on the Rights of the Child."

12. Dr. Sudqi El Alami goes on to say, within the foregoing context, this:

> "Evidence from the proceedings to date indicates that whilst the courts have recognised the relation of T to the S's as their ward in accordance with the foreign adoption and Mr. S's sponsorship of the child and of Mrs. S, they have nevertheless emphasised at several points that she is not their biological child. As T's sponsor with legal and financial responsibility for her in the UAE he is the first choice as her guardian, provided he meets the conditions for guardianship specified in the aforementioned Articles 180 and 181 of the Personal Status Law. Whilst this is not affected by the position that T is an adopted child, the opinion that she has no natural parents has an impact on the entitlement to custody in accordance with the Shari'a, and consequently the Personal Status Law."

13. The expert goes on in relation to the judgment of the Court of Cassation to conclude as follows:

> "**In the Appeal Number 38/2014 Cassation (of which there are in the case file a draft and final ruling) the Court of Cassation has overturned the earlier rulings and awarded custody of the child to Mr. S.** It bases this position primarily on Article 147 of the Personal Status Law asserting that this Article allows that "Should there be no party fit for custody, or no party accepting custody, the judge shall choose a male or female trusted relative of the minor under custody or others or may place the minor in a qualified institution." [c168, para1] It goes on to say that Article 147 does not differentiate between male and female and claims that this quote leaves no room for the application of Article 144(2)(b). [C171]
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> Article 147 does not explicitly state that the person appointed as custodian may be male or female, but provides that: 'If there are no parents and custody is refused by those entitled to it the judge shall choose whomsoever he considers suitable from the relatives of the child, or non relatives, or one of the institutions qualified in this regard.' The explanatory memorandum of the Article goes on to say: 'If there is no person who is entitled to custody, or who accepts custody, the judge shall choose a person he trusts, man or women, of the relatives of the child or others, or shall place him/her with one of the institutions qualified in this regard. This ruling is based on the Hanafi School.'
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> This Cassation ruling is, on the face of it, an unusual application of the law. Islamic law and the UAE Personal Status Law do not allow a man to have custody of a child who is not in the categories of relationship to

him that prohibit marriage between them. The law states categorically that for a man to have custody he must, 'be of a degree of relationship to the child that makes marriage between them unlawful if it is a girl.' [Law 28.2005, Article 144(2)(b)] It goes on to say: 'In all cases there shall be no entitlement to custody where there is a difference of sex for a person who is not prohibited in marriage by degree of relationship to the child whether male or female.' [Law 28.2005, Article 146(5)]

It seems incongruous that the broad provision of Article 147 should override some of the fundamental qualifications required in a custodian, as defined in Articles 143 - 146 of the Personal Status Law. It would be expected that the person whom the judge considers suitable should be chosen from amongst those who meet the qualifications or, in other words, by definition the criteria for 'suitability' should be those listed as the qualifications for custody. **What is clear, however, is by this literal application of Article 147 and its explanatory memorandum the Court of Cassation has taken the strict position that Mr. and Mrs. Sare not T's parents, as according to the letter of the Article this provision applies only where there are no parents**."

14. In the circumstances it would appear that the effect of the judgment of the Court of Cassation in Dubai is that, whilst custody was awarded to Mr. S as a guardian of T, it was not awarded on the basis that he is T's father. Indeed it would appear that, subject to further questions being asked of the expert, the effect of the judgment of the Court of Cassation is that for the purposes of the law of the United Arab Emirates neither the mother nor the father are T's parents.

15. The impact of the decision of the Court of Cassation on the mother's position is also stark and is dealt with by an addendum report from Dr. Sudqi El-Alami dated the 8th October 2015. Having been asked the question, "What is the law in Dubai applicable to visiting rights between RS and T?" he replied as follows:

"Further to my original report, however, I have looked into what visiting rights RS might have with regard to T and I have to conclude that, as a consequence of the Cassation ruling, Article 154 cannot be applied. As discussed previously the Court of Cassation has overturned the rulings of the lower court and awarded custody of T to QS on the basis of Article 147 of the Personal Status Law: 'If there are no parents and custody is refused by those entitled to it, the judge shall chose whomsoever he considers suitable from the relatives of the child, or non relatives, or one of the institutions qualified in this regard; and the explanatory memorandum to this: If there is no person who is entitled to custody or who accepts custody, the judge shall choose a person he trusts, man or woman, of the relatives of the child or others, or shall place him/her with one of the institutions qualified in this regard. This ruling is based on the Hanafi School.'

Given that the court has effectively stated that Mr. and Mrs. S are not T's parents and that QS is an appropriate non related custodian (apparently by virtue of his being her sponsor and guardian with the means to

> provide for her needs) there are no applicable grounds for Mrs. S to have visiting rights under any of the clauses 1, 2 or 3 of Article 154. If the court were to admit Mrs. S's status as T's mother in order to grant visiting rights then there would be no reason to deny her priority right to custody as, so far as I am aware, there are no other impediments to her custody. Correspondingly, in awarding custody to Mr. S, the Court of Cassation has made no provision for visiting with regard to Mrs. S.
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> I reiterate my opinion that this ruling of the Court of Cassation, using Article 147, to override the provisions of Article 144(2)(b) and Article 146(5) (referred to on pp. 6 and 7 of my original report) is highly unusual and not in keeping with the spirit of Shari'a, but as a Cassation ruling it is final and not subject to appeal."

16. Thus, as I have already pointed out, the position for T in Dubai would appear to be that in law neither Mr. nor Mrs. S is her parent and, further, that Mrs. S does not have the right, or any rights, of visitation in relation to T.

THE LEGAL STATUS OF T

17. The difficulties that the expert has identified in relation to T's legal position in Dubai *viz-a-viz* her parents foreshadow issues that have come to the fore regarding T's legal status in this jurisdiction during the course of this hearing.

18. Following the decision of the Court of Cassation in Dubai, Mr. S applied to this court to discharge the wardship in respect of T on the grounds that the basis for warding T, namely that the Dubai court had awarded custody to the mother, no longer applied given the judgment of the Court of Cassation. That application came before me for a three day hearing commencing yesterday.

19. The order, which listed the hearing before me stated at paragraph 1 under the heading "Issues" as follows:

> "The issues for the court's determination at the next hearing shall be (subject to the trial judges determination), (a) finding of fact and determination of jurisdiction. The remaining issues for adjudication will include, (b) any welfare issues arising from any confirmation of jurisdiction."

20. Both Mr. Proctor on behalf of Mr. S and Mr. Perkins on behalf of Mrs. S have lodged comprehensive and extremely helpful Skeleton Arguments as to the issue of jurisdiction in this case. That issue of jurisdiction has, however, to be examined in light of an issue that has developed greater significance over the course of yesterday and today.

21. That issue, to which I have already alluded, is the issue of T's status as an adopted child under English law. Having read the papers in this matter ahead of this hearing, I was unclear as to T's status in English law *vis-à-vis* her parents. In particular I could see no indication on the face of the papers that T's adoption in Nepal has been the subject of recognition under English law. Whilst there is some suggestion on the face of the papers that State agencies in this jurisdiction are satisfied that T is the adopted child of the

mother and father for the purposes of English law (not least the fact that she was given British citizenship by the Consulate in Dubai in 2008 and the fact that the local authority apparently informed the mother on her arrival in England that she had no need to apply to adopt T in the United Kingdom) I could not find any further evidence that T's adoption in Nepal has been recognised in this jurisdiction. In those circumstances I adjourned the hearing yesterday afternoon to allow counsel to make further enquiries of their respective clients and to consider the position under English law. Counsels' enquiries revealed the following.

22. The adoption that took place in Nepal, that I have recounted, was not a Convention adoption, Nepal not having ratified the 1993 Hague Convention on Protection of Children and Co-operation with respect to Intercountry Adoption until 2009; T's adoption in Nepal having taken place in 2008.

23. Further, Nepal was not on the list of countries in respect of whom an adoption constitutes an 'overseas adoption' under English law. The list of countries in respect of whom adoptions constitute 'overseas adoptions' for the purposes of English law, and hence are automatically recognised under English law, was originally set out in the Adoptions (Designation of Overseas Adoptions) Order 1973 SI 1973/19. Nepal is not on that original list.

24. In the circumstances the question arises whether following the implementation of that particular order, on the 1st February 1973, Nepal has ever been subsequently added to the list. The answer to that would appear to be no. Whilst the 1973 Order was amended in 1993 to add China to the list (see the Adoption (Designation of Overseas Adoptions)(Variation) Order 1993 SI 1993/690), that appears to be the only amendment between 1973 and 2013 adding a country to the list of designated jurisdictions. In 2013 the 1973 Order was revoked and replaced by the Adoptions (Recognition of Overseas Adoptions) Order 2013 SI 2013/1801. Once again Nepal does not appear on the 2013 list.

25. As I have already recounted, in 2009 Nepal signed and ratified the 1993 Hague Convention on intercountry adoption. In 2010 the Special Restrictions on Adoption from Abroad (Nepal) Order 2010 SI 2010/951 placed restrictions on intercountry adoptions in this country where the child was from the jurisdiction of Nepal. That order, and its guidance, make no reference to Nepal ever having been on the designated list of countries in respect of whom adoptions constitute 'overseas adoptions'. It would therefore appear, and indeed I am satisfied that Nepal has not at any time been on the list of countries for designation of overseas adoptions.

26. Finally, the parents confirm through their counsel that they have themselves taken no steps to have T's adoption recognised in the jurisdiction of England and Wales, either at common law or through a declaration of the High Court.

27. In the circumstances it would appear that T, in addition to not being recognised as a child of the mother and father under the law of Dubai, is not at present, for legal purposes, a child of the mother and father under the law of England and Wales; although as I have already made clear T is a national of the United Kingdom by virtue of the Certificate of Registration dated the 16th September 2008 to which I have already referred.

28. Thus this is the position facing the court in the context of the father's application to discharge wardship in respect of T and the context within which I am required to consider whether the English court has jurisdiction in respect of T and, in particular, whether I should exercise the inherent jurisdiction of the High Court in relation to this young girl.

THE QUESTION OF JURISDICTION

29. Following extremely constructive discussions outside court, and a view taken by Mr. S for which he must be heartedly commended, the parties are now agreed that this court does have jurisdiction in respect of matters concerning parental responsibility as regards T. That agreement is reached on the following three bases. Firstly, that T is a national of the United Kingdom and a British citizen. Secondly, that the court has jurisdiction by operation of s.2(a) of the Family Law Act 1986 as a consequence of ongoing divorce proceedings in this jurisdiction commenced by the mother in June 2012. Thirdly, that this court has jurisdiction under Art.12(3) of Brussels IIA by reason of (a) T having a substantial connection with England and Wales due to the fact that her mother is habitually resident in this jurisdiction, (b) the mother and father having accepted expressly the jurisdiction of this court in matters of parental responsibility concerning T and (c) it being in the best interests of T for the courts of England and Wales to exercise jurisdiction in matters of parental responsibility over her.

30. I have accepted the agreement of both parents as to jurisdiction, but in light of recent Court of Appeal authority it is beholden upon me to say a little about why I have accepted the parties' agreement based on T's nationality. Not least because, as I have recounted, the courts in Dubai have to date been exercising jurisdiction in relation to T and have made substantive decisions concerning her welfare. Both counsel rightly draw my attention to a number of authorities relevant to the question of whether the English High Court should exercise its inherent jurisdiction based on the nationality of a child who is not, at the present time, within this jurisdiction.

31. That there is such a jurisdiction was made clear by the Supreme Court in the case of *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening* [2013] UKSC 60. From paragraph 60 onwards Baroness Hale of Richmond observed thus:

> "[60] We have already established that the prohibition in section 2 of the 1986 Act does not apply to the orders made in this case. The common law rules as to the inherent jurisdiction of the High Court continue to apply. There is no doubt that this jurisdiction can be exercised if the child is a British national. The original basis of the jurisdiction was that the child owed allegiance to the Crown and in return the Crown had a protective or parens patriae jurisdiction over the child wherever he was. As Lord Cranworth LC explained in *Hope v Hope* (1854) 4 De GM & G 328, at 344-345:
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> > "The jurisdiction of this Court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly

> brought up and educated ; and according to the principle of our law, the Sovereign, as *parens patriae*, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects. The first question then is, whether this principle applies to children born out of the allegiance of the Crown ; and I confess that I do not entertain any doubt upon the point, because the moment that it is established by statute that the children of a natural born father born out of the Queen's allegiance are to all intents and purposes to be treated as British born subjects, of course it is clear that one of the incidents of a British born subject is, that he or she is entitled to the protection of the Crown, as *parens patria*."

[61] The continued existence of this basis of jurisdiction was recognised by the Court of Appeal in *Re P (GE) (An Infant)* [1965] Ch 568, where Lord Denning MR said this:

> "The court here always retains a jurisdiction over a British subject wherever he may be, though it will only exercise it abroad where the circumstances clearly warrant it: see *Hope v Hope* (1854) 4 De GM & G 328; *In re Willoughby* (1885) 30 Ch D 324; *R v Sandbach Justices, ex p Smith* [1951] 1 KB 62."

The Law Commissions in their Report also recognised its continued existence, while pointing out that "there appears to be no reported decision in which jurisdiction to make a wardship order has been based on the allegiance of a child who was neither resident nor present in England and Wales" (see Law Com No 138, paras 2.9 and 4.41). In fact, *Hope* was just such a case, as the boys in question had been born in France to British parents, had never lived here (although they had been brought here for a few days by their father), and were in France when the proceedings were begun.

[62] However, in *Al Habtoor v Fotheringham* [2001] 1 FLR 951, para 42 Thorpe LJ advised that the court should be "extremely circumspect" and "must refrain from exhorbitant jurisdictional claims founded on nationality" over a child who was neither habitually resident nor present here, because such claims were outdated, eccentric and liable to put at risk the development of understanding and co-operation between nations. But in *Re B; RB v FB and MA (Forced Marriage: Wardship: Jurisdiction)* [2008] 2 FLR 1624, Hogg J did exercise the jurisdiction in respect of a 15 year old girl born and brought up in Pakistan, who had never been here but did have dual Pakistani and British nationality. She had gone to the High Commission in Islamabad asking to be rescued from a forced marriage and helped to come to Scotland to live with her half-brother. The High Commission wanted to help her but felt unable to do so without the backing of a court order. Hogg J made the girl a ward of court and ordered that she be brought to this country. The half-brother was assessed as offering a suitable home and in fact she went to him. Hogg J explained that she thought the circumstances "sufficiently dire

> and exceptional": para 10. In *Re N (Abduction: Appeal)* [2013] 1 FLR 457, McFarlane LJ commented that "If the jurisdiction exists in the manner described by Hogg J then it exists in cases which are at the very extreme end of the spectrum" (para 29). The facts of that case were certainly not such as to require the High Court to assume jurisdiction over the child in question.
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> [63] In my view, there is no doubt that the jurisdiction exists, insofar as it has not been taken away by the provisions of the 1986 Act. The question is whether it is appropriate to exercise it in the particular circumstances of the case. Mr Turner accepts that Parker J did not address herself to this basis of jurisdiction and to whether, if Haroon were not habitually resident here, it would be appropriate to exercise it. He accepts that the case will have to return to her in order for her to do so."

32. In terms of whether the jurisdiction should be exercised, as opposed to whether the jurisdiction exists, at paragraphs 64 and 65 in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60 Baroness Hale went on to say:

> "[64] Mr Setright, with the able assistance of Mr Manjit Gill QC, has raised a number of important general considerations which may militate against its exercise. It is inconsistent with and potentially disruptive of the modern trend towards habitual residence as the principal basis of jurisdiction; it may encourage conflicting orders in competing jurisdictions; using it to order the child to come here may disrupt the scheme of the 1986 Act by enabling the child's future to be decided in a country other than that where he or she is habitually resident. In a completely different context, there are also rules of *public* international law for determining which is the effective nationality where a person holds dual nationality.
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> [65] All of these are reasons for, as Thorpe LJ put it in *Al Habtoor v Fotheringham* [2001] 1 FLR 951, para.42, 'extreme circumspection' in deciding to exercise the jurisdiction. But all must depend upon the circumstances of the particular case."

Baroness Hale went on to list a number of factors that were relevant within the context the particular case then before that court.

33. Recently the Court of Appeal has examined in more detail the circumstances in which the jurisdiction, identified by Baroness Hale in the case of in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, should be exercised (see *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)* [2015] EWCA Civ 886).[1] At paragraph 45 and 46 of her judgment in *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)* Black LJ stated as follows:

[1] Since this judgment was handed down the Supreme Court has allowed an appeal against the decision of the Court of Appeal in *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)* [2015] EWCA Civ 886 (see *Re B (A Child)* [2016] UKSC 4).

"[45] In our judgment, the use of the inherent jurisdiction in cases where the child is outside the jurisdiction remains subject to the long-established and consistent jurisprudence. Various words have been used down the years to describe the kind of circumstances in which it may be appropriate to make an order – "only under extraordinary circumstances", "the rarest possible thing", "very unusual", "really exceptional", "dire and exceptional", "at the very extreme end of the spectrum." The jurisdiction, it has been said, must be exercised "sparingly", with "great caution" (the phrase used by Lord Hughes JSC in *A v A*, § 70(v)) and with "extreme circumspection." We quote these words not because they or any of them are definitive – they are not – but because, taken together, they indicate very clearly just how limited the occasions will be when there can properly be recourse to the jurisdiction.

[46] Moreover, and as we have already explained, those occasions will in modern times be even more limited than previously, given, first, the effect of the 1986 Act and, secondly, the other recent developments noted by Thorpe LJ and Baroness Hale. The importance of the 1986 Act in limiting recourse to the inherent jurisdiction is plain. In our judgment, the analysis of Ward J in *F v S (Wardship: Jurisdiction)* [1991] 2 FLR 349, and his warning against using a return order as an artificial device to found jurisdiction, are as valid now as then, and remain unaffected by anything said in *A v A*."

34. In the foregoing context Black LJ held in *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)* that the absence of a remedy for a party in Pakistan was not sufficient to justify intervention of the English court in circumstances where the child was not habitually resident in England on the alternative jurisdictional basis of the child's nationality. In that regard Black LJ said as follows at paragraphs 52 and 53:

"[52] Overall, unsatisfactorily general though the evidence is, we are prepared to proceed on the basis that it is very unlikely that the courts in Pakistan would be prepared to recognise the appellant as having any relationship with P that would entitle her to relief. She could hardly hope to demonstrate the necessary kind of parental, or in any event familial, relationship with P unless she were tolerably frank about the nature of her relationship with the respondent. But in that case, even if the Court evinced no actual hostility to the appellant, the evidence about societal attitudes strongly suggests that her consequent relationship with P would not be recognised as one which justified any legal protection. Thus, while we need reach no conclusion about the alleged "risks to all concerned", what matters is that the appellant will have no realistic opportunity to advance her claim in the Pakistani courts.

[53] However, in our judgment that state of affairs is not by itself enough to justify the intervention of the English court. The fact that local judicial processes are, to our perception, inadequate does not in any way lessen the difficulties about seeking to invoke the inherent jurisdiction when a child is abroad. As a matter of principle, such a claim to jurisdiction sits

> most uncomfortably not merely with the long-established jurisprudence but more particularly with the provisions of section 1(1)(d)(i) of the 1986 Act and the decisions in *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951, and *Re N (Abduction: Appeal)* [2012] EWCA Civ 1086, [2013] 1 FLR 457. We would not wish to lay down any rigid boundaries for the exercise of the jurisdiction; all must depend, as always, on the circumstances of the particular case. However, we are satisfied that the present case does not approach the very high threshold necessary to justify the exercise of the jurisdiction. We are very willing to accept that the attenuation or even – if this is, regrettably, what happens – the ultimate loss of her relationship with the appellant will be a real detriment to P, quite apart from being a great grief to the appellant herself. But it has to be recognised that the respondent has always been P's primary carer, that the appellant had not been part of the household for some time before P and the respondent left for Pakistan and that the appellant has never even in this country had any legal parental rights. The situation falls short of the exceptional gravity where it might indeed be necessary to consider the exercise of the inherent jurisdiction."

35. On the face of it, having regard to the expert report of Dr Sudqi El-Alami, it might be said that the position of the mother in this case is very similar to the position which pertained in *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)*. On a clear reading of the expert report, the mother has, by virtue of the law pertaining in the jurisdiction of Dubai, no remedy in relation to T, either as her mother, or to any lesser degree, in seeking custody of, or access to her.

36. However, having regard to the history that I have outlined during the course of this judgment in my assessment matters in this case go much further than they did in the case of *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)*. In that case the child had a legal parent exercising parental responsibility for her. The child's legal status *viz* her parent was absolutely clear and firmly established. In this case the position for T is, in my judgment, fundamentally different and much more stark.

37. It would appear to be the case that T has been adopted by the mother and father under the law of Nepal. However the jurisdiction of Dubai, where T currently resides, does not recognise the adoption of T by her mother and father. The result of that position under the law of Dubai is clear from the judgment of the Court of Cassation and the expert report; namely that T is not, under that jurisdiction, the daughter of the mother and the father. At best, she is the ward of the father.

38. Further, and again accepting that it would appear to be the case that T's adoption by the mother and father was lawful in Nepal, on the face of the information available to the court at the present time it would not appear that any of the automatic mechanisms for the recognition of a foreign adoption in this jurisdiction apply in this case and no steps have been taken in England to have that adoption recognised under English law.

39. The consequence of this position is that, in addition to it being the case that T is not the legal child of the mother and father in Dubai, T is not the legal child of the mother and father for the purposes of English law. In the circumstances, on the face of it T has no

parents save in the jurisdiction of Nepal; that being the only jurisdiction that appears to date to have recognised the adoptive relationship between the mother and father and T.

40. Within that context it is further clear from the expert report that this situation cannot be remedied in Dubai, as the law that pertains in that jurisdiction does not recognise adoption and does not therefore, axiomatically, provide for the difficulties regarding T's status as a child of the parents that I have outlined to be remedied. The only jurisdiction that is capable of remedying the position and achieving the situation that was intended by both parents in 2008, and that has been the assumption of both parents (and T) since 2008 and throughout the majority of T's life, is that of England and Wales. Thus it will be seen that, in my judgment, the position of T in this case is fundamentally different and fundamentally more stark than the position of child P in the case of *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)* before the Court of Appeal.

41. I of course bear very carefully in mind the cautionary words of Black LJ at paras 45 and 46 in *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)*. However, having regard to the fact that at present it is by no means certain that T is the legal child of the mother and father anywhere other than Nepal, and to the fact that it would appear on the information presently available to the court that only the English court is in a position to remedy that situation (the Dubai courts, as I have said, being bound by the ambit of the law governing that jurisdiction to the position endorsed by the Court of Cassation) I am satisfied in this case that there exist extraordinary circumstances justifying this court having recourse to the inherent jurisdiction on the basis of T's British nationality in addition to any other jurisdictional bases that may apply in this case.

CONCLUSION

42. In the circumstances, and for the reasons I have given, it seems to me that this matter is, by virtue of T's extreme situation regarding her legal status, one of those rarest of creatures where this court is justified in invoking its inherent jurisdiction based on the child's nationality notwithstanding that T is not presently in the jurisdiction.

43. In such circumstances I endorse the agreement reached by the parents that this court has jurisdiction in respect of T based on her nationality in the extreme circumstances of this case. That decision is reached with all possible deference to the courts in Dubai. I make clear that my decision is no reflection, in any way, on the manner in which the courts in Dubai have dealt with this matter, nor is it in any way an adverse comment on the laws applied in that jurisdiction. Rather my decision is simply a reflection of the extraordinary circumstances that T finds herself in by virtue of the manner in which her adoption by the parents has come about.

44. In the circumstances I approve the draft order placed before me by the parties in this case. I will list this matter for a further hearing at which directions will be given with a view to resolving T's current situation and providing her with the legal certainty that the parents believed they were achieving back in Nepal in 2008.

45. That is my judgment.