Neutral Citation No: [2019] EWHC 3099 (Fam)

IN THE HIGH COURT OF JUSTICE - FAMILY DIVISION

Case No: FD19P00173

Courtroom No. 42

Strand
London
WC2A 2LL

Thursday, 18th July 2019

Before:
MR TEERTHA GUPTA QC
SITTING AS A DEPUTY HIGH COURT JUDGE

B E T W E E N:

D

and

O

MR A PERKINS and MS M ASHCROFT (Solicitor) appeared on behalf of the Applicant
NO APPEARANCE by or on behalf of the Respondent Mother
MR J BANERJI and MS D MARSDEN (Solicitor) appeared on behalf of the Respondent Child

JUDGMENT
(Approved)

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, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Introduction

1. The court is concerned with the future welfare of J who turns 10 years of age very soon, having been born 1 August 2009.

2. The applicant father was represented by Mr Alistair Perkins and the child by Mr Jay Banerji during a substantive hearing that lasted 3, 4 and 5 July 2019. The mother was not physically present or represented during 3, 4 and 5 July, but her Polish lawyers have attempted to assist the court by sending information through from Poland.

3. They, and others, have refused acceptance of the trial bundle when the father's Polish lawyers attempted to serve it on their client.

4. However, I see at C123 in the bundle that the entire bundle was sent by email on Friday 28 June to a number of email addresses for the mother, including the one that she has communicated recently to the court from and indeed to the child's solicitors.

5. This judgment is produced orally. It is an *ex tempore* judgment. When the transcript is approved, it will no doubt then be translated and sent to the mother and so for the purposes of today, although there is an interpreter in court, I do not produce this judgment at translation speed, it being now 2.30 in the afternoon and my judgment will take at the very least one and a half to two hours to deliver. The mother will get a translated judgment in due course.

6. I delayed the beginning of this hearing by a day to 4 July so the mother could be told by email about the start of the process, while I completed my judicial reading. This allowed the child's legal team to email Mother and her lawyer in Poland the following message:

> 'Mr Teertha Gupta QC, sitting as Deputy High Court Judge, has requested the following email to be sent to the mother. A three-day hearing is listed in the High Court in London. At this hearing the court is dealing with an application under Article 11(7) of Brussels II Revised. This court may make an order requiring J's return to this jurisdiction. Such an order would be enforceable and unappealable by a court in Poland under Article 11(8) of Brussels II Revised. The court will hear submissions and evidence from 10.30am on Thursday 4 July 2019. A Polish professional interpreter has been provided by the court to assist you so that you have the opportunity to

engage in these proceedings. Please note, the court is giving active and anxious consideration to this application under Article 11(7) Brussels II Revised. You are invited to contact the court via email to participate in the hearing by telephone using the following email address. In the alternative, please contact us and we will be happy to assist you with this'.

The Mother's case and involvement in these proceedings

7. This resulted in a third missive from the mother's Polish lawyers, who claimed not to have instructions to represent the mother in these proceedings, timed at 15.10 on the second day of the hearing, that is to say 4 July. However, nothing at that stage was received directly from the mother, whose last message to the court at that stage was C63 which is an email that she wrote on 15 April 2019 saying as follows:

8. 'Urgent information, FD19P00173, hearing on Monday 15 April 2019.

> '*Dear Sir/ Madam,*
> *Please sen these documents to the Judge URGENTLY. The hering is in the morning at 10:30 before MR Justice Holman .I received notification of the hearing a few days before the hering , the document were sent to me in the eanglisch language ,I do not know .I was not able to read and understand them.My English is not good enought ,and I am not able to represeant myself .I have no mony to instruct solicitor privatles .On Friday late afternoon I learned that I am not eghible for legal aid .I was abble only translate som urgent information regardin minor my Dother J.Please pass that urgent information to the MR Justice Holman before today Hering*
> *Kind regards, O'*

9. If the mother did write that message herself, it shows me that her English is good enough. However, of course, I understand that she would want to have an interpreter for this hearing, and indeed the Court has provided her with an interpreter throughout this hearing and indeed today. The interpreter at this present moment in time is unable to interpret the speed that I am producing this judgment, but he may well want to provide a summary or a gist of what I am saying as I am going along.

10. I pause here to mention that the father's Polish lawyer, has taken all the correct steps under Polish law to serve the mother with these proceedings. Even though she refused to accept them in her workplace in Poland, and even though she instructed her Polish lawyers not to accept them the manner in which he served the documentation is still regarded as good

service in Poland,. The mother would not even attend the Polish lawyer's office for collection of the papers. But this cannot be allowed to frustrate the process.

11. The very fact that the mother has joined by telephone in this hearing today, of course, shows one that she could have joined this hearing by telephone on 3, 4 and 5 July.

12. However, I must say that I am most grateful to the mother's involvement and engagement in these proceedings, albeit in writing only and indeed, the correspondence that her Polish lawyers have provided this court. They have said on numerous occasions that they do not represent her in these proceedings but they have taken the pains to provide numerous documents and correspondence to the court to provide the court with as much information as it can have, about what the mother's case is concerning the application that the father is making to this court.

13. For example, at page C136 in the bundle, there is a document dated 29 June which runs to about nine or 10 pages, entitled, *'Statement on behalf of O'*, and that provides a full chronological history of the proceedings in Poland, what has happened as far as the mother is concerned, supporting her position. I am treating her position as being in direct opposition to the father's application. She obviously opposes the father's application, even though I have not received a formal document from her or representations from her directly that she opposes it, I am treating it as being opposed.

14. On 5 July, which was the last day of the three-day hearing, I was still considering what my decision was going to be, when I received a number of documents from the mother via her Polish lawyer who, as I said, does not represent her in these proceedings.

15. I paused and did not come to my decision but wanted the relevant documents to be translated so that I could consider what they said because, of course, the mother's Article 6 ECHR rights are at the foremost of my mind, as indeed are her Article 8 rights . In addition, the Article 6 and 8 rights of the child, J, are engaged; she is not physically here, but of course, her best interests are represented by the Guardian and her solicitor.

16. Three sets of documents have been sent through during the course of this hearing and I have to say that they were sent and received just before I completed my deliberations, and I have considered them fully.

17. On 5 July, as I said, a number of documents came through and they were sent by the mother herself from the email address, one of which the father's solicitors had sent the trial bundle to (as I mentioned above). I point out at this stage that there has been no issue concerning the service of the proceedings but rather the service of the trial bundle. The mother, of course, had service of the application which is why she wrote to Holman J on 15 April. There has been no issue about service of or the issuing of the proceedings but rather of service receipt of the trial bundle in hard copy form, which I find the mother has actively avoided.

18. I also point out that the relevant documents have been translated into Polish, even the Guardian's reports have been translated into Polish and sent to the mother's email address. From the email address that she sent through documents on the morning of 5 July 2019, on the very morning that I was considering my judgment, to be delivered that afternoon, she sent through a letter. This letter says as follows:

> Your Honor,
>
> thank you for allowing me to make a statement on the case in Polish and send me a letter from the court in the language in which I communicate.
>
> First of all, I would like to state that all my previous activities, since my departure from Great Britain, are only aimed at protecting my child against pedophiles, the grandfather and the father.
>
> Regarding my case, I am asking the High Court, first of all, to take into account that I must protect my daughter, prevent her from contact with the perpetrators of sexual violence, provide her with a sense of security and allow a normal life in a situation where she found herself through improper and reprehensible grandfather's behavior and father to her. I am a mother and I can not act otherwise. I am despairing from the moment I found out what happened to my child, I can not accept it, but all my activities are focused on letting J live in a normal situation and defeat what happened to her. And live normally in the future.

I am sorry that I had to leave Great Britain, leave everything in Britain for years and build and build life from scratch. It's a huge experience, but the most valuable thing I have in my life is my daughter J, for which I am able to devote my life to protect her.

19. That letter goes on for eight pages. The latter part, which is the first two and a half pages ends as follows:

'Therefore, I am sending my statements this morning, directly before the ruling in the case, indicating that I did not participate in the proceedings, I was not served with any procedural documents, I did not use the translator's help and I was denied legal assistance, and submitting statements and documents to and support them 4 hours before the ruling, undoubtedly violates my rights, is harmful to J and contrary to its good.
Because for me, as a mother, the best good is J's good and her protection from a pedophile father, I declare before the High Court, as follows, and in the attachments I send documents confirming the truthfulness of my statements:
'

She then summarises a number of documents.

20. I have to say, I do not accept, as the judge in this trial, who has deliberately delayed this judgment on a number of occasions to hear and read what the mother is saying, that she has not been given an opportunity to participate in these proceedings. I take the view that she has. I beg to differ with her when she says has not been served with any procedural documents. Of course she has. That is exactly why she sent the email through to Holman J on 15 April. That is why she knows about this hearing. That is why she knows about these proceedings.

21. As for: 'I did not use a translator', we have had an interpreter sitting in court ready for her, today and throughout this hearing, at great public expense.

22. I also note that as far back as when these were Children Act proceedings, (which I am going to explain in more detail in due course), before Her Honour Judge Downey on 14 March 2017, for example, paragraph F of the recital says as follows: '*The parents will each require interpreters at the fact finding hearing to be listed at the next hearing but not at the FCMH on 5 May 2017'.*

23. The mother was fully aware that interpreters are available in this court as they have been available in the past so I do not understand her when she says that she has no interpreter available.

24. Turning back to the email that was sent earlier on, I have seen an English translation of it because I waited for a publicly paid translation of the documents which were sent through on 15 July, including a document entitled, '*Determination about the change of decision regarding charges'.* It is dated 16 November 2018 from a city in Poland. It is from the assessor of the District prosecution in the city in Poland, considering the allegation and the evidence gathered in the case against the father. It says as follows:

> *'Determined. To change the determination date 3 October 2018 about allegations and charges against the father and to present the father, born on [] in the city in Poland, to charge that in the period since 2014, … not established, and no later than to June 2016 on the territory of Great Britain and on the territory of Poland in short-time intervals, with prior intention, he on many occasions put the juvenile, under 15 years old, J, to the subject of other sexual activity by way of twice touching her genitals with a finger, 10 times putting his tongue into her mouth and of that he tried on two occasions to initiate a sexual act by putting his penis into her mouth; however he did not achieve [this] due to the attitude of the victim, which was her escaping. He was also presenting her with pornographic material in the form of films [contrary to] Article 201 … of the Penal Code, Article 13(1) of the Penal Code in relation to Article 201 of the Penal Code in relation to Article 201 of the penal code in relation to Article 201 of the Penal Code in relation to Article 12 of the Penal Code'.*

25. I have seen the Forensic Psychologist's opinion dated 15 November 2018 and a document which did not need translating, which is the Child and Family Assessment from a London Borough dated 21 November 2017. There is a passage there that I note which says as follows:

> 'Analysis and Professional Judgement. In my assessment, J is a child who has suffered significant trauma in the form of sexual abuse, … inappropriate familial relationships, the separation of her parents and parental conflict. She has also experienced a high level of fear and anxiety due to the alleged threats her grandfather made should she disclose the abuse to anyone. As such, her physical and emotional presentation over the last year has indicated that this is a child who has experienced distress and trauma. J has expressed reluctance to have contact with her father and has expressed fears that he will try to convince her to have further contact with her paternal family. J is also aware [that her] father has continued to have contact with his father, despite her allegations and I believe this has been very confusing for her to understand. This also may lead to J being concerned about the extent to which her father could keep her safe, should she ever be in his care. There

> are some concerns that the father may have attempted to influence J and persuade her to retract allegations which have concerned the mother but was alluded to by J when she was interviewed by the Polish prosecutor on 5 July 2017'.

26. That gives the general tenor of the kind of concern that the mother had. At that stage, concerning that quotation I have just given, the allegations were against the father's father; J's paternal grandfather, rather than the father and the paternal grandfather. However, that developed to be allegations against the father himself in due course.

27. I then received a second tranche of documents yesterday, which again confirmed to me that the mother is indeed involved in these proceedings, engaged in these proceedings, and again I am grateful to her for sending these documents through her Polish lawyers. That was received yesterday via Messrs Creighton and Partners who represent the best interests of J in these proceedings and I am grateful to Ms Holly Hickman who pointed out that the documents that I received were already in the bundle and even gave me the page references that I could find them in.

28. Ms Hickman also liaised with the Polish Embassy, and I am grateful to the Polish Embassy sending a representative over today to hear this judgment and no doubt assist the mother in due course in understanding it and its implications.

29. There was a third tranche of emails received this morning from the mother to Ms Hickman. I say from the mother; actually it was from the mother's Polish lawyer who, again, assisted this court greatly in although not representing the mother formally, by sending through the documents and allowing her to be as involved as she chose to be. An email was sent, according to English time at 1 o'clock in the morning, and it says as follows:

> **From:** A
> **Sent:** 18 July 2019 01:02
> **To:** Holly Hickman
> **Cc:** Deborah Marsden; Molly Ashcroft
> **Subject:** Re: J
> **Importance:** High
>
> Ladies and gentlemen, in attachment, I am sending the mother's position regarding the draft of the applicant's attorney order sent to me. Please, on behalf of the mother, in accordance with the arrangements with her to submit tomorrow in the hearing this letter and make it read in the presence of a sworn translator. The letter contains a number of important

information regarding the demands of the father and is aimed only at protecting J and issuing the ruling in accordance with its good. Yours faithfully. Attorney A

30. The document alluded to is regarded as the mother's 'position'. A position document, is probably how we would phrase it in England and I have read that very carefully. It runs to a number of pages. There is a passage in there that is worthy of note. It says as follows:

> "It should be pointed out that the ruling of the Polish Court, refusing to issue J to the United Kingdom, based the Court not only on the provision of art. 13 b of the Hague Convention, **but also the provision of art. 20 of the Hague Convention, according to which the return of a child is not admissible in the light of the statutory rules of the requested State regarding the protection of human rights and fundamental freedoms. Thus, the order requested by the father on the basis of art. 11 para. 8 of the Brussels II Bis Ordinance** shall not be issued, because according to the content of the quoted article, execution in accordance with Section 4, Chapter III of the Regulation shall be subject to any subsequent decision issued on the basis of a regulation, **after refusal of return of a child pursuant to Art. 13 of the Hague Convention. Thus, issuing a decision on refusal of a child's return based on art. 20 of the Hague Convention makes it impossible to issue the next ruling, which is carried out without the need for a declaration of enforceability. Therefore, issuing a return order, as demanded by the father, will require a declaration of enforceability in the Republic of Poland. Meanwhile, legally binding to refuse to declare the enforceability of the decision of the Court of Higher Instance of the Family Department in London issued in Case No. FD17P00472 of November 14, 2017, in the same factual and legal circumstances already ruled the Court of Appeal in Wrocław in a decision of November 19, 2018, in Case I ACz 1401/18, rejecting the application of the father for the declaration of enforceability of paragraphs 2 and 3 of the judgment…the mother states, accuses and claims that the demand of the father is contrary to the good of the child…"**

31. In other words, what is being said there is that the refusal, which I will deal with in a moment, of the child's return under the Hague Convention is under Article 20 of The Hague Convention and therefore Article 11(6-8) (of Brussels II bis) does apply in the way that it applies to refusals to return a child under article 13 of the Hague Convention.

32. I am grateful to the mother's Polish lawyers for setting out position in full and, really, they could not have put it any fuller as far as I can see that she has not been disadvantaged at all by not being orally represented during this hearing.

33. But this application before me comes as a direct result of Father's application for the summary return of J to England pursuant to the 1980 Hague Convention, being refused by the Polish court at first instance on 6 December 2018, on the grounds of Article 13, I have read an English translation of that judgment, all 47 pages, carefully, and it simply refers to Article 13 and no other Article. Here I turn to page B81 of the bundle, and it says as follows:

> Translation. It is submitted as the judgment, "justification… It is submitted that the justification that the application is unfounded since there are reasons under Article 13(a) and (b) of the Convention to refuse to order the return of the child and additionally the child objects to being returned and has attained the age and degree of maturity at which it is appropriate to take account of her views. Article 3, sentence two of the Convention.
> In addition, it is alleged that the request for the return of the child should be refused because there was a serious risk that the return of the child to the United Kingdom would expose the child to psychological harm and place the child, J, in an intolerable situation due to the applicant's conduct and actions in the United Kingdom, in view of the disclosure made by J regarding sexual abuse by the applicant father, lack of understanding, support or help for J in the situation. Article 13(b) of the Convention".
> There is a great risk that her return would expose the child to psychological harm and place the child in an intolerable situation in view of the inappropriate sexual behaviours of her father towards her which she disclosed. Article 13(b) of the Convention. The fact that she would have to be separated from her mother would cause her significant psychological harm and place her in an intolerable situation, Article 13(b) of the Convention. The applicant did not actually exercise his rights [when] that J was retained. Article 13(b) of the Convention. J objects to being returned and has attained an age and degree of maturity by which it is appropriate to take account of her views. Article 13, sentence two of the Convention… B125 The mere fact that J is the victim of sexual abuse, this is suggested by several expert opinions, had undoubtedly placed a significant psychological and developmental burden on her. In light of the above, the court took the view that J's best interests are in opposition to being ordered to return and the application in question should therefore be rejected on the basis of Article 13(1)(b) of the Convention…
> The court, despite the originally admitted evidence in the form of a report to be prepared by an expert sexologist, came to the conclusion that this evidence was no necessary in the light of examination of the conditions of Article 13 of the Convention and annulled the order to accept evidence from the expert sexologist, taking the view that the question of the child's sexual abuse by the father should be investigated in criminal proceedings'.

34. I will deal with this in due course, but this decision was appealed by the father unsuccessfully to the relevant Polish Court of Appeal. I have been provided with the Polish copy of that decision. There seems to be some discussion towards the end about Article 20 but, at the end of the day, the decision was to uphold the decision of the court below. The father's appeal was refused. Therefore, the decision that I focus on is the decision of the court in the first instance and the basis of the refusal was Article 13 and Article 13 alone.

35. That allows the father the ability to seek the return of his daughter under Articles 11(6-8) in Brussels II Revised. He has offered undertakings and is content for the child to remain in the direct care of the mother if she wishes to escort the child back and then to have no direct contact or indirect contact with J until this court looks into the matter further.

36. Here I quote from Article 11(6-8) in this rather battered copy of Brussels II Revised that I have in front of me. I know that the mother had been given a Polish translation of this Article some time ago . Brussels II Revised is, of course, EC Regulation 2201/2003 and states as follows:

> '11(6) If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.
>
> (7) Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child. Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.
>
> (8) Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child'.

37. I also quote here at this stage Article 40: '(1) This section shall apply to…(b) the return of the child entailed by a judgment given pursuant to Article 11(8)'.

38. Additionally, Article 42:

> 'Return of the child. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.
> Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.
> The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph one only if:
> (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;
> (b) the parties were given an opportunity to be heard; and
> (c) The court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention. In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.
> The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning the return of the child(ren)). The certificate shall be completed in the language of the judgment'.

39. I have reacquainted myself with those Articles and indeed the practical guide on Brussels II Revised, pages 58 to 66. I also mention a note in *The Red Book*, the current one, 2019 which is at page 2902 states as follows:

> '…a certificate under Article 42 cannot be issued unless judgment of non-return has been issued beforehand, even if that decision has been challenged. … a certified judgment could not be refused in the enforcement state because of welfare concerns, which must be pleaded in the Member State of origin and which should also hear any application to suspend enforcement of its judgment.
> Opportunity to be heard. The requirement to give the child and the parties an opportunity to be heard does not impose an obligation to do nothing until the child and/ or the parents have been heard. [Re A (Custody Decision after Maltese Non-Return Order) [2009] 1FLR 1923 FD]'.

40. Finally, concerning the procedure, I quote here, [Family Procedure Rules] 12.60:

> 'Procedure under Article 11(7) of the Council Regulation where the court receives a non-return order made under Article 13 of the 1980 Hague Convention by a court in another Member State.
> (1) This rule applies where the court receives an order made by a court in another Member State for the non-return of the child.
> (2) In this rule, the order for non-return of the child and the papers transmitted with that order from the court in the other Member State are referred to as "the non-return order".
> (3) Where, at the time of receipt of the non-return order, the court is already seised of a question of parental responsibility in relation to the child, -
> (a) the court officer shall immediately –
> (ii) serve copies of the non-return order on each party to the proceedings in which a question of parental responsibility in relation to the child is at issue; and
> (ii) whether the non-return order was received directly from the court or the central authority in the other Member State, transmit to the domestic Central Authority a copy of the non-return order.
> (b) the court shall immediately invite the parties to the 1980 Hague Convention proceedings to file written submissions in respect of the question of custody by a specified date, or to attend a hearing to consider the future conduct of the proceedings in the light of the non-return order'.

41. During the course of this hearing, I have briefly heard evidence from the father and from the Guardian. I would have heard from the mother via a Polish interpreter if she had made herself available and decided to engage in the proceedings orally, even evidence by telephone would have sufficed, but she did not. However, nothing has been lost in that respect because all the questions that could have been put to her were put to the Guardian or have been considered by me in the round.

42. J became a ward of the court on 18 September 2017 in circumstances that I set out below. What I recognise at the outset is that obviously I am being asked to make a draconian and severe order within the proceedings set out under Articles 11(6) of Brussels II Revised , in relation to a child who has been in Poland for almost two years. She went there with her mother on a holiday on 22 July 2017, so almost exactly - here we are on 18 July 2019 - two years ago, but she has remained there ever since.

43. The father has tried to enforce English orders for the swift return of the child via Articles 11, 21 and 23 of Brussels II Revised procedure of registration enforcement and even issued an application, as I have mentioned earlier on, under the

1980 Hague Convention in the intervening months. However, all of that has been to no avail.

44. The mother remains with J in Poland and the last time the father saw her was in January of last year, 18 months ago. The last time he spoke to her on the phone was in September 2016. This is a parlous state of affairs.

45. I point out here, of course, that J's paternal grandfather, the person against who she made the original allegations of sexual abuse, lives in Poland, and I believe , although it is not relevant to my decision, in the very same village that the mother is currently living in.

46. Without making any final decision on the subject, nor binding the hands of any English judge who subsequently deals with this case and with J's future welfare decisions, if I accept the Guardian's oral evidence of 4 July, when she said to me this case potentially ranks as '10 out of 10 in the spectrum of private law high conflict cases', it is a plain fact that the mother has retained J in Poland wrongfully in the summer of 2017. She even applied for an extension of the holiday to Her Honour Judge Downey but was refused on 10 August 2017. Therefore, it is clear that the mother knew that she needed permission to relocate to Poland, to stay there longer, but was refused it by the competent judge in England.

47. What has followed since has resulted in no long-term welfare based decisions being made in England or Poland concerning this little girl who was abducted and has not seen or spoken with her father for 18 months as a result of the mother's actions. I make no moral condemnation of the mother, far from it. She has her reasons no doubt. She feels that her child will be exposed to more sexual abuse by the father, even though there are no criminal or civil findings against him in either country, and even though the Polish police have only recently added bail conditions of no contact with the child which I gather the father is appealing. I have not seen any listing of any criminal hearing in Poland.

48. However, what I am being asked to do is to consider returning J to this country in her mother's care, or if the mother refuses, to return in the care of her paternal great aunt, so that swift welfare based decisions can be made concerning her long term best interests.

49. It is clear to me that the mother is fully aware of this hearing, has been from the outset and has chosen to be involved in this hearing, albeit in writing only. Because of her physical absence and lack of representation at this hearing, I have her and her daughter's human rights, especially as I said earlier, in their Article 6 and 8 human rights, at the forefront of my mind.

50. I delayed commencement of this hearing by a day so that, as I said earlier on, the message could be sent out to the mother. The message that I sent at the end of 4 July hearing was heard by the mother to the extent that she then sent a document, a letter directed from herself to her child's solicitors in England, that they then relayed on to me and of course I have had that translated.

51. One has to always be extra vigilant concerning an individual's Article 6 and 8 of Human Rights when they have chosen not orally to engage in a hearing or send a representative. As I said earlier, I am treating this application as being fully opposed by the mother and dealing with all the potential defences that she might raise as to procedure and merit. I found her Polish lawyer's letters extremely useful, which is no doubt why she sent them.

52. As I have said earlier on, and apologies for the repetition, I say that the mother has *chosen* not orally to engage in these proceedings. It is clear to me that she knew the hearing from Holman J because the email that she herself sent on the morning of 15 April 2019, where she then raised no issue about the service of the father's application under Articles 11(6-7).

53. I refer to C76 of the bundle, a statement from the father's solicitor, Ms Molly Ashcroft, dated 27 June 2019 and it states as follows:

> 'On 15 April 2019, the mother and her representatives were served with a copy of the order made by Holman J, by email to the following email addresses and the mother was advised that she was directed to file and serve a statement and any evidence by 13 May..

54. The mother was further advised of the time and date and location of the file hearing listed 3 to 5 July and the documents the mother received during the course of the hearing show me that she knew full well about the hearing.

55. Additionally, it has to be borne in mind that the mother provided Polish translations of a draft version of the order of Holman J on 15 May 2019 in her documents that were lodged before the Polish Court of Appeal (which dealt with the appeal of the Hague Convention non-return order). That appeal court of course then refused the father's application for appeal.

56. As I said, I have been greatly assisted by the documents the mother has sent through and I have read them in detail and I have considered the tenor of her case; the fact that she is saying that she has a criminal complaint against the father , her reasons for non-return of the child as set out in her letter that she sent to meand the fact that she is saying that she feels that she has been disenfranchised by the process. However, I have to say, objectively I cannot accept the latter point.

The procedural history of this matter

57. The factual procedural history of this matter as follows, and here I quote from the very useful document that has been provided by the father's solicitors:

> 'The parents married in December 2008, separated in May 2016, and a decree absolute was declared on 17 March 2017. J is the parents' only child. Father has parental responsibility for J. The mother reported that J made allegations against the paternal grandfather to the Police in May 2016. This led to a Section 47 investigation and a police investigation in June 2016. J was referred to the Vulnerable Children's Team and CAMHS.
> J gave an ABE interview in the UK on 26 May 2016 and the matter was been fully investigated by the British Police and no further action has been taken. As the paternal grandfather resides in Poland, the British police referred the matter to the Polish authorities in July 2016 and I gather the Polish police are still investigating the matter and I have seen a date in 2020 when they plan to take some next steps.
> The father had regular contact with J until July 2016. On 28 August 2016, the mother stopped facilitating any contact between J and the father. The father issued an application for a Child Arrangements Order on 23 September 2016 and the matter was listed for an FHDRA on 14 November 2016.

> Prior to the hearing on 14 November, the mother made an application for permission temporarily and permanently to remove the child from the jurisdiction to go to Poland. The application was listed alongside the father's application. The mother was not willing to agree any contact, supervised or otherwise, at the hearing on 14 November 2016, and the father sought an urgent hearing for interim contact.The matter was listed for interim hearing on 22 November 2016 (**B7-10**). It was ordered that J is to have supervised contact with the father, to be facilitated by J's allocated social worker (at a London Borough) and the allocated social worker is to undertake work with J prior to contact to ensure that contact took place. The mother's application for temporary removal of J to Poland for the purpose of the mother's medical treatment was granted. A London Borough was directed to produce a s7 report by 4pm on 24 January 2017.
> The father had one session of arranged contact with J on 8 December 2016.
> On 20 January 2017, the mother stated that J made new allegations to her against the father and an addendum s7 report was subsequently filed. The Police fully investigated these allegations and J had an ABE interview on 24 February 2017. The father was interviewed by the police on 22 March 2017. The police confirmed that they would take no further action on 28 March 2017.
> The matter was listed for a dispute resolution hearing on 7 February 2017. The proceedings were allocated to a Circuit Judge. The mother's applications for temporary removal of J to Poland for medical appointments on 13 and 20 February 2017 and in the event that J is required to be physically present in Poland to assist the Polish authorities were granted. It was ordered that the parents shall file a list of allegations they seek to rely on, by 4pm on 28 February 2017. Further directions for disclosure from the Local Authority and primary school were sought.

58. The father filed a schedule of allegations on 28 February 2019. The mother filed a schedule on the same date, of allegations. All these documents in the bundle that comprises of about 800 pages I have looked at.

59. The court was not satisfied that the mother's schedule was fit for purpose and she was directed to file an amended schedule. She prepared a total of three further schedules. The court was unable to consider the final schedule of allegations filed on 11 July as the mother did not return to the jurisdiction for a hearing listed on 15 September 2017.

60. Here again, I remind myself of the order of Her Honour Judge Downey of 14 March 2017 where she refers to the fact finding and says as follows:

> 'A fact finding hearing is required to determine whether (1) the child has been sexually abused by (i) the paternal grandfather (ii) the father. (2) The mother has alienated the child against the father. …. If the mother has to travel to Poland for the purpose of medical appointments, she will use her

best endeavours to ensure that these appointments are during school holidays but this may not always be possible. The father accepts the mother has nobody in the UK to care for J and if provided with written confirmation of medical appointments, the father has indicated he will agree to the child travelling to Poland with the mother'.

61. The English Court was going to determine the allegations, and in the interim the mother's application for temporary removal of J to Poland was granted.

> 'Further case provision directions for disclosure were made. Paternal grandfather was invited to intervene in the proceedings in the usual way and attend the hearing from 5 May 2017. The matter was listed for pre-trial review on 5 May 2017.
> On 5 May, J was joined as party in the proceedings and it was ordered that no professional was to complete any work with J until further order of the court. Guardian was appointed pursuant to rule 16.4 of the Family Procedure Rules 2010 and the mother was granted permission temporarily to remove J from the jurisdiction from 27 May to 4 June in order to provide details to the father.
> On 22 May, the matter was adjourned and relisted for an FCMH. Again it was ordered that no professional should complete any work with J until the finding of the Court. Father gave an undertaking not to allow any contact between J and paternal grandfather, and the mother sought further undertaking not to bring J in contact with the paternal grandmother but the Court declined to do so.
> FCMH was listed on 23 June 2017 and at the hearing the Court indicated that, in principle, it was fair to authorise the three-week trip for J to go to Poland but would determine the mother's application on 7 July 2017.
> Paternal grandfather was joined as party for the purpose of responding to the allegations made against him. Mother was granted permission temporarily to remove J from the jurisdiction to Poland from 2 July to 6 July so that J could attend an interview at the District Court in the city in Poland on 5 July.
> It was ordered that the Guardian should file a report including any recommendations that interim contact was to have that may be given to J to repair her relationship with her father on 29 August'.

62. Obviously the criminal proceedings were carrying on in Poland, the police having had the matter of the paternal grandfather referred to them by the English police, nevertheless the mother was still engaged in child arrangements and welfare based proceedings concerning J in England, and obtained <u>temporary</u> permission to relocate to Poland for a holiday with a view to coming back with the child and the criminal investigation in Poland carrying on.

63. The history of the proceedings carries on: on 7 July 2017, Her Honour Judge Downey granted the mother leave to remove J from the jurisdiction to Poland from 22 July to 12 August 2017 inclusive. The Court provided that if the mother wished to extend her stay in Poland to the 19th, she had to apply for permission to rely on such an extension.

64. However, unbeknownst to the Guardian or the father, on 30 July, the mother issued an application in Poland for J to live in Poland and receive a psychological assessment.

65. I pause there and add that, of course, the Polish court did not have jurisdiction over any full welfare decisions of the child at that stage. The child was habitually resident in England and Wales and proceedings had commenced in this country.

66. I carry on with the chronology: On 8 August 2017, the mother applied to the English court to extend her stay in Poland to 19 August, but Her Honour Judge Downey refused that application on 10 August and the order dated 11 August confirmed that. The mother was to return J to the jurisdiction on 12 August 2017. That order can be found at B44 in the bundle. It says as follows:

> 'Date 11 August 2017. Family Court at West London. Her Honour Judge Downey.
> Upon receiving mother's application by email for permission to extend J's stay in Poland, up to and including 19 August 2017, on 8 August 2017, and upon receiving father's email of 9 August 2017 opposing the extension of J's stay in Poland and upon the court not being satisfied that J's treatment needs to take place between 12 and 19 August 2017, and upon the court considering that on balance, the work the Guardian needs to carry out needs to take priority at this stage, and upon the court considering that the need for a further trip to Poland may be considered on 15 September or at an early hearing if an application is made, the mother's application to extend J's trip to the Republic of Poland is refused. …. Her Honour Judge Downey, 11 August 2017'.

67. It is very clear the mother knew the jurisdiction that she needed to apply to and it is very clear that she actually knew what the order was as a result of her application and that it had been un successful ie for her to carry on living in Poland with J was in breach of the order granting her permission to take the child on holiday.

68. On 22 August, the father's solicitors contacted the solicitor for the child expressing concern that J had not returned to the jurisdiction of England and Wales as directed by the court. The father received notice from Polish Family Court that the mother had issued proceedings in Poland, I have just mentioned, concerning J.

69. The mother did not reply to messages left by the Children's Guardian on 15, 16, 17 and 22 August 2017. On one occasion when the Children's Guardian attempted to call the mother, she received a foreign sounding dialling tone and a Polish speaking person answered. The mother cancelled an office appointment at CAFCASS to take place on 16 August 2017. The Children's Guardian was unable to meet or speak with J or the mother since before their departure to Poland.

70. I pause there just to add that the current Guardian who has been appointed in this matter is very experienced (and I will turn to her evidence in due course), replaced the previous Guardian, but she too has been unable to gain access to actually speaking to J, because her mother has not allowed her to do so. That, to my mind, shows in full technicolour why the process of conducting enquiries from this court in England, with this particular child being in a foreign country, impossible. This court often conducts enquiries with children who are actually physically present in another jurisdiction but it requires the cooperation of the parent who is with the child abroad. That, of course, has not been possible in this case.

71. On 23 August 2017, the mother's solicitors confirmed to the parties that they were without instructions from the mother and advised the parties to attempt to communicate with the mother directly. The solicitor for the child emailed the mother on 23 August 2017 however she has not replied to date.

72. On 24 August 2017, Children's Services legal services wrote to the solicitor for the father to confirm that the mother had contacted the social worker directly to confirm that *"she has taken J to Poland permanently where she will be accessing psychological help for her."* The father subsequently received notice that Mother had issued proceedings and a hearing would take place on 31 August 2017. He made an application via ICACU, the International Child Abduction Contact Unit under the Hague Convention on 25 August 2017 seeking J's

return to England claiming that she had been wrongly detained as of 12 August, in other words, in a 'hot-pursuit' manner.

73. The mother applied to the Polish Court seeking an order for J to live with her in Poland on the basis that she believed J had had improved psychological input in Poland. The hearing was listed on 31 August 2017 in Poland regarding her application for J to remain in Poland.

74. In August 2017, the paternal grandfather was arrested, interviewed and charged with offences against J. He was released the following morning. In September 2017, "preventative measures" were put in place against the paternal grandfather. On 6 September 2017, and this is of worthy note, the Guardian, the child's own Guardian issued High Court proceedings and the matter was listed on 18 September 2017. The mother was given a notice of the hearing but did not attend and sent her representatives and the mother sent a position statement to the court. On 18 September, the court made J a ward of this court and ordered that she return to the jurisdiction forthwith within 48 hours of service of the court order, B61.

75. It has to be borne out that the B62 sets out on 18 September 2017, the order of His Honour Judge Nathan, sitting as a judge in the High Court, that the applicant was the child herself through her Guardian. 'The applicant is the child, J. Date of birth: 1 August 2009 through her Guardian represented by Gemma Kelly, counsel' and on that application, the court made a wardship order and orders as follows, 'The respondent shall return the child to England and Wales forthwith and in any event within 48 hours of service of this order'.

76. The fact that Mother is in breach of that order and previous orders does not figure in my mind at all when it comes to assessing her case before me. I am simply stating this as a chronological history of the proceedings in this matter. I do not criticise the mother in her motivations, but what I am looking at is what is in the best interests of this child long-term and how this process which started in England should finish.

77. The Guardian's solicitor served the court order that I have just mentioned on 18 September on the mother and her solicitor in Poland on 19 September. She served a translated version

on the solicitor and the mother on 20 September 2017. Of course, as we all know, the child has not been returned to this jurisdiction.

78. The Hague Convention proceedings then took place in Poland having been initiated by the father and there were a number of hearings in those proceedings. The initial hearing took place on 3 November. The sixth hearing took place on 5 January 2018. During the course of those Hague Convention proceedings, the Polish court determined that contact should take place between the father and J on alternate weekends and supervised sessions were to commence on 8 January 2018 and continue on a 14-weekly basis, but the mother did not facilitate that contact. I have read, however, the psychological reports, two of them that set out an analysis of the sessions and that took place on the 15and 19 January 2018.

79. On 2 February 2018, the police complaint made by the mother on 4 December 2017 was transferred to a city in Poland and a "case" was opened on 3 April 2018.

80. The High Court order dated 14 November 2017 was considered in Poland on 4 April 2018 and accepted by the court in the first instance. The mother sought to appeal the order and a hearing was held on 31 October 2018 and judgment was handed down on 19 November 2018. On appeal, the court determined that the High Court order would not be enforced in Poland. The father can appeal the decision to the Supreme Court in Poland but I understand this will likely take several years and so he has decided not to take that route.

81. A further 11 hearings took place in Poland in respect of the father's 1980 Convention application for the summary return of his daughter to England. Those hearings took place on 8 February, 22 February, 14 March, 15 March, 5 April, 3 and 13 August, 28 August, 30 August, 25 September, 22 October and 20 November 2018. Finally, an order of first instance was made on 6 September 2018 by the Polish courts in the first instance to dismiss the father's application under the 1980 Hague Convention for the summary return of J on the basis (as I said earlier) of Article 13(b). The ICACU sent the relevant documents to the applicant's father's representatives on 24 January; translations on 11 February 2019.

82. The father's representatives then filed an appeal against the first instance's decision. The applications were considered and refused on 21 May 2019 with a written judgment being provided on 27 May 2019.

83. In respect of the criminal prosecution of the paternal grandfather, eight hearings have taken place between May 2018 and November 2018. In November 2018, the court directed that the psychological assessment should be completed and some five months later in May 2019 the court determined who should carry out the report and directions should be filed by 31 March 2020. Apparently, the parties are unable to appeal that decision.

84. The prosecutor in the city in Poland charged the father in respect of the complaint by the mother on 4 December 2017. He charged him on 3 October 2018. J was interviewed on 14 November 2018. The father was interviewed on 19 November 2018 and on 17 December 2018, the police in the city in Poland suspended the case against the father and this court has seen recent documentation, where the prosecutor decided to provide bail conditions against the father and my understanding is that he has actually been charged.

85. The father issued his application under Article 11, (6-8) of , EC Regulation 2201/2003 on 23 March 2018. I just pause there just to turn to that. It is at C67 and I actually see a stamp which says 2 April 2019, but it is dated 23 March 2019.

86. That resulted in the order that I mentioned earlier on of Holman J dated 15 April 2019 and also, a very short order of Moore J prior to that dated 2 April 2019 which listed it for directions for 15 April and ordered as follows: '*The mother and child's Guardian are to attend the hearing together with such legal representation, if any, as they wish to instruct'.* As I said earlier on two occasions in this overly long judgment, the mother then wrote to the High Court on the morning of 15 April and Holman J then provided on 15 April, directions setting the matter down, ordering the mother to, *'File or serve a statement together with any evidence upon which she sought to rely in response to the father's statement by 4pm on 13 May 2019'* and for the Guardian to prepare a report.

87. It has to be said that the father's application had within it the details of what he wanted and his statement in support is dated 23 May 2019 which is at page C52 of the bundle. The mother had this document sent to her and in it, he says as follows in paragraph 48:

> *'In the event that J and her mother return to the jurisdiction for an extended period for the proceedings, I propose that they remain in the former family home. I am willing to provide undertakings to the court in the following*

terms to enable this to take place. I, the father provide the following undertakings to the court pending the first inter partes hearing before the court in England and Wales ceased of the welfare matters relating to J.

a) Not to institute voluntarily or voluntarily support any proceedings whether criminal or civil for the punishment of the mother arising from the retention of J in Poland since 11 August 2017.

b) To pay for return one-way economy flights from Poland to London for mother and J.

c) Not to contact the mother directly or indirectly save through solicitors or at her request.

d) To vacate the former family home at least one clear day prior to the return of J to the jurisdiction of England and Wales to enable J and her mother to take up residence there.

e) From the date upon which J returns to the jurisdiction of England and Wales, not to enter or attempt to enter the former family home or go within 100 metres of it until further order.

f) To pay the mortgage and reasonable utilities excluding phone and Internet on the property for a period of six months or until first inter partes hearing before the court of England and Wales whichever is the earliest.

g) to pay the sum of £500 a month in maintenance to the mother seven days prior to the return of J into the mother's UK bank account and, thereafter, the same sum for the following six months or until the mother has made a successful application for state benefits for support for herself and J.

h) Not to enter or attempt to enter J's school in J's presence or until further order.

i) Not to remove J from her mother's physical care save for any periods of contact agreed between the parties or ordered by the court.

j) Not to bring J in direct or indirect contact with either paternal grandmother or paternal grandfather.

k) Not to make reference to either paternal grandfather or grandmother to or in the presence of J.

l) Not to speak any language other than English during any period of supervised contact with J unless the contact supervisor is a fluent Polish speaker'.

88. That shows me that the father's compendious offers of undertakings were exactly the kind of thing that would be required of him while the court looks into this matter because, of course, there are very serious allegations at the heart of this family to be investigated.

89. The father then provided a second statement which is dated 27 June 2019 which sets out his position if the mother refuses to return with J and he is proposing that his paternal aunt, who J knows, comes back with J and stays with J pending any investigations by this court. However, of course, that would only be a fallback if the mother is not willing to return with the child which I sincerely doubt.

90. He then stays as follows:

> 'Alternatively, if the mother is not content with the above proposals, I propose that the maternal grandmother returns J to the jurisdiction and lives with her in the family home until the conclusion of the proceedings. I have previously proposed this during the proceedings in Poland. I am prepared to offer undertakings to the court to provide for J upon return to the jurisdiction and her carer whether it be Mother, the maternal grandmother or an alternative carer'.

91. I have said a lot about the mother's allegations against the father. I should also add this. The father says in this statement, which is dated 27 June 2019, as follows:

> 'I deny the allegations of sexual abuse that have been made against me. The Police investigated the complaint made in January 2017 and in March 2017, they concluded that no further action would be taken. In December 2017, the mother made a complaint to the prosecutor in Poland and they have interviewed J and myself. I was charged on 4 October 2018. No bail conditions were put in place. In December 2018 the case was suspended on the basis that further information is received from Children's Services and the Police'.

92. I add - I have just said earlier on, there are further developments in Poland, but if the Polish police earlier on were waiting for information from Children's Services and the Police, it shows me that the basis of the allegations and the enquiries really does emanate from allegations about what has been going on in England concerning the father.

Procedure

93. I have mentioned the procedure on the Family Procedure Rules 12.16 earlier on. However, obviously, this Rule is not really relevant because the mother knew the judgment for non-return from the Polish court in the first instance, she was involved in those proceedings and, of course, the Children Act proceedings were already underway and this application flows from within those very proceedings. It may have a different case number, but it is still part of these proceedings and I understand and endorse what the father did through his lawyers in any event, which is to ensure that there was a swift Article 11(7) hearing and that the matter did not fall between two stools while he waited for the courts.

94. Pursuant to Rule 12.60(3)(b), the court is immediately to invite the parties to the 1980 Hague Convention proceedings to file written submissions in respect of the question of the child's future in light of the return or the non-return order. Therefore, in order to make sure the matter did not fall between two stools, the father issued his application on 29 March 2019 and his solicitors have to be commended for that decision because, I have to say, on a practical level, anecdotally speaking, I have not seen the initiating court (in the 'left behind country', on its own motion, notifying families in a failed EC outgoing Hague Convention case that has failed an Article 13, and listing the matter pursuant to that Rule.

95. To my mind, my endorsement of the father's solicitors' actions is an example of the purposive approach that one has to adopt in procedure concerning such cases, because of the wording of Article 42. It is analogous with what Lord Wilson said in *Re: LC* at paragraph 21. This is in *Re: LC, Children Reunite International Child Abduction Centre – Intervening* [2014] UKSC 1 paragraph 21, Lord Wilson says as follows:

> 'Thus BIIR has added a dramatic further dimension to proceedings under the Convention in which the application is for the child's return to a fellow EU state. When, on whatever basis, it refuses an application under the Convention for return to a non-EU state, a court in England and Wales will conventionally embark (or make clear to the unsuccessful applicant that it would be willing to embark) on a merits-based inquiry into the arrangements which will best serve the welfare of the child; and it will reasonably

> anticipate, particularly in the light of the presence of the child here, that its decision will be fully enforceable. But when, by reference to article 13 of the Convention, it refuses an application for a child's return to an EU state, it is aware that an order for return, immune from challenge, may nevertheless be forthcoming from that state; and that therefore the order for non-return may well provide no more than a breathing-space. Prior to making the provision in article 11(8) of BIIR, the Council will no doubt have considered the extra difficulty which faces the court of habitual residence in conducting a satisfactory merits-based inquiry in circumstances in which the child is held abroad and the abducting parent, being also abroad, may decide not to participate or may be unable to fund participation. Practical concerns of this character were presumably overridden by the importance attached to the principle of the primacy of the court of habitual residence (recital 12), to the principle of mutual trust between the courts of member states (recital 21) and to the availability of a power in the court of habitual residence, in specified circumstances of fair width, to request another member state to assume jurisdiction if it considers such to be in the best interests of the child (Article 15)'.

96. I pause there and mention Article 15, no application has been made by the mother, as far as I can see, for a formal transfer under Article 15, but it has been in my mind because, of course, I could under Article 15 think about transferring the welfare-based proceedings to Poland and I do that on my own motion under Article 15.2 (b) if I wanted to and I know that and I have borne that in mind. Nevertheless, the purposive approach and the thinking behind this Article 11 (6) to (8) procedure, as explained so eloquently by Lord Wilson is something that I bear in mind.

97. I also bear in mind the following aspect to the case law in such applications and I quote here Charles J quotation of his can be found in a compendious analysis of law provided by Theis LJ in *Re D, B, N & D (A Child) (By her Guardian ad Litem),* [2011] EWHC 471 (Fam) or [2011] 2 FLR 464. That too was a Polish case when the child went away on holiday to Poland and in that authority, the learned judge quotes another 11 (6) to (8), 11 (7) application and that was the decision of *M v T* (Abduction: Brussels II Revised, Art 11(7)) [2010] EWHC 1479, [2010] 2 FLR 1685 and for the purposes of saving time, I read into

this judgment paragraphs 30 of Theis LJ decision, paragraphs 30, 31, 35 which sets out the CJEU decision opposed against *Povse v Alpago* C-211/10 [2010] 2 FLR 1343 and her own dicta, Theis LJ, which is at paragraph 39.

98. I am actually going to quote, at this stage, paragraph 39 so that those that who are listening to this judgment can perhaps have some understanding of the processes being going on when I have been looking at the case law.

> 'The position can be summarised as follows:
>
> (1) The interrelationship of Articles 10 and Articles 11(7) and (8) of BIIR permit the State of origin (from where the child has been wrongfully removed or retained to) to undertake an examination of the question of the custody of the child, once a judgment of non-return pursuant to Article 13 has been made by a State where a request has been under the Hague Convention 1980;
>
> (2) Proceedings under Article 11(7) should be carried out as quickly as possible;
>
> (3) In undertaking the examination of the question of the custody of the child, the Judge should be in a position that he or she would have been in if the abducting parent had not abducted the child. Thus the whole range of orders that would normally available to a judge should be available when examining the question of the custody of the child;
>
> (4) In undertaking the examination of the question of the custody of the child, the court exercises a welfare jurisdiction: the child's welfare shall be the court's paramount consideration;
>
> (5) It may not be necessary or appropriate to categorise the jurisdictional foundation for such an enquiry as deriving from, or relying upon, the inherent jurisdiction. The foundation for any examination of the question of the custody of the child is simply through the gateway of Article 11(7);
>
> (6) The court has a well-known and historic ability to order the summary return of a child to and from another jurisdiction;
>
> (7) As part of the court's enquiry under Article 11(7) the court does have the ability to order a summary return of the child to this country to facilitate the decision-making process leading to a final judgment;
>
> (8) In deciding whether to order a summary return or to carry out a full welfare enquiry, the court exercises a welfare jurisdiction. It is not altogether clear whether the decision to order a return of the child on a summary basis is more appropriately considered as akin to that which might

> be ordered under the inherent jurisdiction or whether it is effectively a specific issue order under the Children Act order' and I say it is our order. 'If it is more appropriately considered as akin to the inherent jurisdiction then – at least as to the question of summary return – it may not be necessary for the court mechanistically and slavishly to direct itself to the welfare checklist; that having been said, once the child has returned and the court is considering what order to make the court should direct itself to the welfare checklist;
>
> (9) Any summary return order is directly enforceable through the procedures in BIIR (see, Article 42 and Article 47 of BIIR, *Povse v Alpago* (supra))*'*

99. That erudite analysis was echoed by Baker J (as he was then) in *Re AJ (Brussels II Revised)* [2011] EWHC 3450, otherwise at [2012] 2 FLR 489 and at paragraph 29 of Williams LJ *TJ v MS* [2017] EWHC 3802, sorry that is paragraph 20. The earlier decision by Baker J was at paragraph 29.

100. While I am on the subject of case law, I should also bear in mind the inherent jurisdiction decision of Baroness Hale in well-known Texan case, In *Re: KL (A Child) (Habitual Residence)* [2013] UKSC 75 and that was a case where a child was abducted from America and the Hague Convention experienced various technical issues whilst in apposite but the Supreme Court, nevertheless, exercised its narrow jurisdiction for the return of the child pursuant to Article 18 of the Hague Convention.

Baroness Hale said this at paragraph 36 and 37:

> 'The crucial factor, in my view, is that this is a Texan child who is currently being denied a proper opportunity to develop a relationship with his father and with his country of birth. For as long as the Texan order remains in force, his mother is most unlikely to allow, let alone to encourage, him to spend his vacations in America with his father. Whilst conflicting orders remain in force, he is effectively denied access to his country of origin. Nor has his mother been exactly enthusiastic about contact here. The best chance that K has of developing a proper relationship with both his parents, and with the country whose nationality he holds, is for the Texas court to consider where his best interests lie in the long term. It is necessary to restore the synthesis between the two jurisdictions, which the mother's actions have distorted.
>
> Despite the passage of time, there is not the slightest reason to consider that K would suffer any significant harm by returning to Texas on the basis proposed by the father. Indeed, the mother did not defend the Convention proceedings on the basis either of his objections or of a risk of harm should he be returned (although she did suggest that he had been settled here so long

> that to return would place him in an intolerable situation). Had it not been for our decision on habitual residence – which I accept that courts in some jurisdictions might consider debatable, it would have been our duty to return K to Texas under the Convention'.

101. I pause there. I find this last passage most interesting and I have ever since it was enunciated by Baroness Hale all those years ago.

> 'I would therefore allow this appeal and order the return of the child to San Antonio forthwith on the basis of the undertakings offered by his father. But should the mother choose not to avail herself of the opportunity to return with her son, the order for his return will stand. The parties are invited to submit a draft order before this judgment is formally handed down'.

102. That is an example of the most senior judge in the land deciding that, an order for the return of a child from one jurisdiction to another cannot be frustrated by the parent who has care of that child simply saying , "Well, I am just not going to go…' and frustrating the order; the order will remain in force, for the child to be returned.

The psychological assessments in Poland

103. I pause here and just mention the psychological assessments that I have read that took place from the Hague process. As I said earlier on, the process that I am engaged with is taking into account the reasons for evidence that underline the decision by the Polish court not to return this child pursuant to Article 13. I have looked at those psychological assessments and they can be found amongst a set of quotations at D7, 12, 13, 22 and 29 that I have borne in mind and I am going to mention them now because they are really quite worthy of note.

104. This first assessment that took place is dated 29 January 2018 and at D7 it says as follows:

> 'The mother denies all charges made by the applicant (the father) and is convinced that his attitude and behaviour threaten the welfare of the child due to inappropriate behaviour towards the daughter in the form of exceeding her intimate barriers. According to the declaration, the participant was unconvinced of the truthfulness of these accusations. She perceives the applicant as a calculating person willing to manipulate, lie and intimidate. She also claims that the mother refuses to remain in

contact with the father and that the father himself does not provide guarantees of safety, does not protect the child and poses a threat to her. She also fears that the applicant will take the child abroad.

… since her return to Poland, J's health situation was being constantly monitored and the girl also benefits from psychological assistance due to the adaptation difficulties observed by her mother e.g. anxiety, crying, unfounded fears of insects, sleep disorders, hysteria attacks, fear of separation from her mother. She sleeps with her mother on the same bed…

The analysis of the parental predispositions of the mother indicates that they are insufficient for her personal care for the child. However, due to the nature of the limitations, as disclosed by the participant and in particular a tenancy to isolate the minor from the secondary parent is advisable for the mother to take action allowing her to deepen her insight into her current parenting style…

During the play, the participant left the room at the request of the psychologist for interview. J did not react to her mother leaving, she was still sitting in the same position on the carpet and playing with her father. The girl's mood did not change. She presented with a cheerful attitude towards her father, spontaneously answering his questions and talked to him about her daily activities. During the two-hour play with her father, J was always presenting a cheerful mood. Her reactions were spontaneous she laughed out loud, told her father about her friends, school, the cat and gifts that she received on 6 December.

The girl did not react in any way when her mother entered the room to get
the documents left behind by the participant, neither did she ask about her, nor did she want to see her while playing with her father. For a short period of time, she was and remained in the presence of her father only, there was no objection from her.

…initially, the minor omitted her father when she was describing the structure of her family, but after some consideration, she admitted that, "My father is my family but I sometimes cross him out. I cross him out every day". When she was asked to

explain her statement, she said, “I don’t know why”. The minor describes her father as a bad person easily getting angry and shouting.

When she was asked to describe her father’s positive traits, she did not reply for a long time. When she was encouraged, she admitted she saw him as “Nice, cool” but she does not remember anything else’.

105. A further quotation:

> ‘The negative attitude presented by the child towards the possible return to the United Kingdom is contrary to the information contained in assessments concerning her attitude in her previous educational environment. The child is in favour of taking over the point of view of her current upbringing environment.
>
> When the girl was saying goodbye to her father after the assessment was completed, the girl expressed a willingness to meet him in the presence of her mother and assessors and she cuddled him and kissed him on the cheek’.

106. That is the assessment in January 2018 and now I move forward to the second assessment, 13 June 2018 and here at D22 things are looking a lot different.

> ‘The feelings of anger towards her father seems to have increased. J described her father as a liar. She said she would throw him under a bus and run away. J expresses herself with emphasis which confirms the strong emotions she experiences’.
>
> ‘She can foresee long-term consequences of her decisions. She is aware that her staying in Poland results in limited contact with her father as compared to the contact to how it was before, although this is not a direct result. I understand that her relationship with friends in Great Britain will be ceased and she will have an opportunity of establishing relationships with children

in Poland and will go to school there, live in a house there and not in England'

'…she can declare her preferences and dislikes', that is D29.

107. One can start seeing a sea-change in this child's attitude towards her father in the body of those reports which are lengthy and which are considered.

108. The Polish Hague Convention proceedings took 16 months to reach a first instance decision, 25 August 2017 until 6 December 2018, the appeal being refused on 21 May 2019. Of course, I make no criticism of the Polish legal system, but I simply point out the six-week deadline stipulated in Article 11(3) of Brussels II Revised.

My Decision:

109. The questions I need to address as set out by counsel for the father in his skeleton argument which I agree with entirely, having looked particularly at Articles 11 and 42 of Brussels II Revised. -. *Has the child been given an opportunity to be heard within these proceedings* pursuant to Article 42 (2)(a) . I say, 'yes', the child has been represented by a Guardian and counsel. The fact that the mother has not allowed the interview between the Guardian and the child does not mean that the child has not been allowed or given the opportunity to be heard. The Guardian has provided a report, which I will turn to in a moment, about what she recommends as being in the child's best interests and she was a party before removal, retention in Poland. She had a Guardian then, who applied for her immediate return.

110. In the original applications, I have pointed out an order was made for the child's return from Poland on an application made by those acting on behalf of the child. So, yes, she has been involved in not only the Children Act proceedings but these Article 11(7) proceedings.

111. H*ave the parties, in particular, the mother being given an opportunity to be heard* for the purposes of the Article 42 (2) (b) Well, obviously, it is the father's application and clearly, it is not clear already, yes, I am categorically convinced and certain that the mother has had that opportunity. Her Polish lawyers have sent documentation through, albeit not

representing her formally. She knows of these proceedings, she knows of this hearing. She is attending today by telephone and, indeed, while I was deliberating and before I made my decision, she exhaustively sent through a number of documents and even sent letters through directly and I am grateful to her for doing that.

112. The father's trial bundle was sent through to the mother, it was translated and those represent the child and the father. complied with the guidelines in the well-known authority *Re: B (Litigants In Person: Timely Service of Documents)* [2016] EWHC 2365 of Jackson J (as he was then).

113. Of course, the third issue I need to deal with is *do the courts of England and Wales still retain the exclusive jurisdiction over this child*. I find that I do still have that jurisdiction pursuant to article 11(6-8) BII Revised as this was a non-return under article 13 of the 1980 Hague Convention.

Should J return to this jurisdiction?

114. The main question for me is *whether it is in J's best interests for her to return to this jurisdiction for a court in this jurisdiction to make enquiries and determinations about what should be in her best interests in the future and, of course, due process to take place*. The mother's long-term application to live in Poland is to be considered on a full basis even with a full welfare enquiry.

115. The Guardian has given her evidence. Before I turn to the Guardian, I turn to paragraph six at C107 of the father's statement which is something I actually quoted earlier on before the previous passage. He says as follows:

> 'The mother's position is that J rejects any contact with me. My position is that the mother has alienated me from J's life from August 2016 to date. J is entitled to a proper and meaningful relationship with both her parents and unless a return order is made, I will have no relationship with J at all. I spent time with J on 15 January 2018 for almost five hours during the course of the 1980 Convention proceedings in Poland. This contact took place in front of a team of court-appointed psychologists. The contact was positive as set out in the OZSS psychologist's report dated 29 January 2018. I believe that the mother has continued to alienate J since this contact. The court directs that I should spend supervised time with J on alternate weeks started on 8 January 2018. The mother did not facilitate the court-directed contact. In addition,

> the mother sought directions for the preparation of further psychology reports. She was not in agreement with the first psychology report', and I have mentioned both of those reports.

116. The Guardian has considered this matter as one would imagine very carefully. I asked her, when she gave evidence, 'why not simply leave this child in Poland?' She said: 'I have considered it a huge short-term disruption for J if you ordered her return…' but she said that she is looking to the '…longer-term effects of the loss of her father in her life' and sees that as 'a significant loss and not something to be understated'.

117. The whole manner in which this child left the United Kingdom, surprisingly in a half-term school holiday, the June school holiday as opposed to the full holiday, was abrupt and emotionally harmful for her. The Guardian's position is that she, on behalf of the child, has to protect the child's long-term welfare and her future relationships with both parents. She feels that there is a better chance of that happening and a better prospect of there being no loss of the paternal family or paternal involvement in her life (which is a significant element of her and of course any child's identity) if I order a return.

118. The Guardian talked about the 'sense of loss' and the 'irrational sense of rejection' J may feel; the 'void that she may feel in her life' and the fact that 'there is something missing, the fact that long-term this may lead to depression, poor self-esteem' and the Guardian feels this moment is critical in J's life. She pointed out that she has had 12 years of experience with Cafcass. She saw this, as I said earlier on, as one of those 10 out 10 high conflict cases. Going back to her experience, the Guardian was a Probation Officer and Probation Manager for a number of years. She has a Masters in social work from the London School of Economics and I saw her as a reliable expert. The Guardian ended her evidence by saying that if a child is brought up saying that one parent is bad and one parent is good, it is not right, as that affects one's feelings about one's self and then that can lead, of course, to poor self-esteem in later life.

119. Consequently, the Guardian's position, as said in her reports and as translated into Polish so that the mother knew this some days before the hearing formally began, as follows:

> 'At paragraph 14, D44. The main concerns in this case for J have centred on what is thought to have been the victim of a child sexual abuse by her grandfather and father, child abduction, parental conflict and J being deprived of a relationship with her father. With no contact with the paternal

side of the family, it is not clear what narrative J has been given in relation to her move to Poland or her father's absence from her life. It is most unfortunate that this case has not progressed to any degree within the past two years since J was abducted. It is clearly understandable therefore that the father should feel frustration over the protracted proceedings which have not been assisted by the delays within the Polish courts.

It is the case that the reports of sexual abuse against the father raised by mother are fabricated then it would not have amounted to the mother inflicting emotional abuse against J, not least as she has been deprived of a relationship with her father. The reality is that there is clearly a great deal of mistrust between the parents which J has been involved in.

A return to the UK for J would no doubt inevitably signify another period of disruption in her life. She may well have become accustomed to the Polish way of life with her maternal family, new school, new friends. It is unclear the degree to which she would have continued to speak in English. Nevertheless, whether or not J has settled in Poland, the means by which she was taken was emotionally unlawful and certainly against her best interests.

As such, it is my assessment that she needs to be returned to the UK without delay where an assessment can be conducted as to spending time arrangements between her and her father.

Recommendations: J should be returned to the UK with immediate effect. On J's return to the UK with her mother, she should be permitted to remain in her mother's care rather than being taken into Local Authority care. Cafcass will be in a position to complete an assessment to address the matters highlighted in paragraph six'.

120. Those matters in paragraph six are as follows:

'At the court hearing on 15 April 2019, the children's Guardian was directed to prepare a report to assess the following:

1) Whether or not it is in the child's best interest for there to be a summary return of the child;

2) What contact should take place, if any, between the father and the child on return of the child to England and Wales if such a return is ordered?

The respondent must make the child available to speak to the child's Guardian for the purposes of a report ….'.

121. Then the carries on, 'Regrettably, it has not been possible for me to complete a full assessment in this case due to the mother's continual lack of engagement'.

122. As I touched on earlier- that is a key difficulty in this court completing a full welfare-related assessment about J's long-term arrangements if the Guardian cannot speak

to the child and if she is hampered in that process in a way that would not happen if the child was brought back to this jurisdiction.

123. After all, that is what I am being asked to do and I am not being asked to consider what is the long-term best interests of the child e.g. about which country she should live in long-term. Rather, for the legal process of that decision over long-term welfare, which was commenced before the child went on holiday a couple of years ago with her mother, to continue and to reach finality. That process would include a decision in this Family Court about whether not the parents cross-allegations are true to the civil standard, there having been no decision one way or the other in a civil or criminal court in England or Poland to date.

124. I have borne in mind the best interests of the child; I see that as paramount, of course. I have borne in mind the Welfare Checklist. As to ascertaining J's wishes, I assume she would make a plea at this present moment in time that she does not want to return to this jurisdiction and I assume there is going to be a big disruption to her school life. However, all that the Guardian has said and the harm (emotional and developmental) that she is suffering and the ability for her mother to meet her long-term needs concern me greatly. The father cannot be blamed for the effluxion of time.

125. The father issued applications in September 2016 and, of course, the mother ceded jurisdiction to this country as her daughter was, of course, habitually resident here on 7 November 2016 when she herself issued a cross-application.

126. Having given this matter anxious consideration, which is a phrase that I mentioned to the mother, I have continued giving active and anxious consideration right up until about two and a half hours ago when I was putting the final touches to this preparation of this overly-long oral judgment. I find that all the provisions of article 41(2) have been met and re-reading all the documents that the mother has sent and going back through the allegations and the documents that we have had translated from the Polish courts, I have to say that I have no alternative but to order the summary return of this child to the jurisdiction.

127. I am most grateful that somebody from the Polish Embassy is here because I look to my Polish counterpart to enforce this decision which is, of course, unappealable in Poland, but has to be enforced. I make a request via the central authorities for this order for the summary return to be enforced.

128. I look to the father to provide an undertaking that he will not enforce the order for the next 21 days, but I am happy to sign the Brussels II Revised certificate. There is a draft order that has been written by counsel for the father and in consultation with counsel for the child which sets out all the documents that I have read, although I would ask him – he is not here – I would ask him to double-check the documents that were sent through this morning are added to that list. I ask that those that represent the father and the child ensure this draft order is firstly, filed and sealed as soon as possible and secondly, translated as soon as possible and an expedited transcript of this judgment is obtained so that I can tweak any unsolicited language and make any stylistic amendments and additions that I need to do.

129. I know the mother is listening to this judgment. I know that she is worried about it. All I can say is come back, bring your daughter back, let the English court and authorities get on with the proceedings and decide what is in J's long-term best interests. That is my decision and it is my judgment.

End of Judgment

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