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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No. FD22P00491

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 13 March 2023

Before:

MR JUSTICE MACDONALD

(In Public)

B E T W E E N :

MARYAM ALLAMI

Applicant

- and -

(1) ALI FAKHER
(2) A CHILD (by their Children's Guardian)

Respondents

MR M BASI (instructed by Dawson Cornwell) appeared on behalf of the Applicant Mother.

THE FIRST RESPONDENT appeared in person, assisted by his McKenzie Friend.

MS PAPA ZIAN (instructed by Goodman Ray) appeared on behalf of the Second Respondent.

J U D G M E N T

MR JUSTICE MACDONALD:

- 1 The substantive proceedings in this matter concern an application for an order under the inherent jurisdiction of the High Court, requiring a return by the father to this jurisdiction of M, born in May 2008, who is 14, and E, born on in May 2012 and now aged 11. M was joined as a party to these proceedings by the order of HHJ Scarratt, sitting as a Deputy High Court Judge on 11 October 2022. He is today represented through his children's guardian.
- 2 This matter now comes before the court on the mother's application to commit the father of the children for contempt of court for failing to comply with the terms of a series of orders made by Newton J on 18 November 2022, ICC Judge Mullen on 13 December 2022, Moore J on 16 December 2022 and Mr Colton KC on 9 January 2023. That application to commit was issued on 31 January 2023. The mother is represented by Mr Basi of counsel.
- 3 The mother is an Iranian national who has been living in the United Kingdom since 2022 and holds dual Iranian and British citizenship. Whilst the father was granted legal aid by the court at the outset of these contempt proceedings, the father has appeared unrepresented with the assistance of a McKenzie Friend, Mr Lennard. At the outset of the hearing I gave Mr Lennard permission to advocate on behalf of the father, a task that Mr Lennard performed with conspicuous care and balance. The father also holds dual Iranian and British citizenship. He has lived in the United Kingdom for most of his life but has recently spent more time in Iran. He has a number of aliases.
- 4 In determining this matter, the court has had the benefit of the evidence contained in the trial bundle that is before the court. In support of her application the mother relied on the concessions by the father that (a) the children remain in the jurisdiction of Iran and have not yet been conveyed into the care of the maternal grandparents nor returned to the jurisdiction of England and Wales, and (b) the father has not provided a notarised document for the consensus of the children travelling from Iran to England, immediately the same was completed. The mother further relies on the recitals in the previous orders made by the court recording the father's stated position that he will not comply with any orders of this court. The father exercised his right to silence and Mr Lennard made submissions on his behalf. I also heard submissions on behalf of M.
- 5 Given the complexity of the regime put in place by the orders that are the subject of consideration by this court and the potentially penal consequences of allowing the mother's application, I reserved judgment for a short period.
- 6 Dealing with the background of the matter, the mother and the father met through mutual friends in or around 2006. They married under Sharia law in the UK on 28 July 2007 and had their civil marriage ceremony on 24 January 2008. At that time the father used the name Srio Alimo Fernandez. It was the father's case that he changed his name by deed poll afterwards to Ali Fakher. M was born in the United Kingdom and is a dual British and Iranian citizen, as is E. It is the mother's case that she and the father were jointly responsible for raising the children since their birth, that the father was critical of the fact that she was not a stay at home mother. It is the father's case that he was solely responsible for the children's care before he left for Iran, and also since August 2021 when the children remained in Iran. M has stated that both parents were present and looking after him and his sister when he was young.
- 7 The mother contends that she suffered emotional and psychological abuse from the father throughout the relationship and that he displayed controlling behaviour. The father contends that there was no evidence of domestic abuse. Both the mother and M allege that the father

was violent to the children and would hit them. The father asserts that such allegations are false.

- 8 In 2015, following the sad death of his mother, the father began spending more time in Iran. In July 2021, the mother and the children travelled to Iran with return tickets to the United Kingdom for 24 August 2021. It is the mother's case that she and the children travelled to visit the maternal grandparents. By contrast the father asserts the purpose of the trip was to reignite the parents marriage. During the time when the mother and the children were in Iran the father applied to register their marriage in that jurisdiction. The mother contends that as a result she became worried about what would happen to her and the children if the father was successful in registering the marriage, and so decided to cut the trip short and book tickets to return to the United Kingdom on 3 August 2021. The father alleges that the mother had in fact decided to abduct the children from Iran and to travel abroad with them without his knowledge and consent, which was contrary to Iranian law.
- 9 Within the foregoing context, the mother alleges that when she and the children tried to leave Iran on 3 August 2021 they were told that the father had removed the permission for the children to leave the country. By contrast the father alleges that because the children had arrived in Iran with Iranian passports, the Iranian authorities expected the father's consent before the children could leave Iran with British passports since dual citizenship was not recognised under Iranian law. For reasons I will come to the question of the father's consent to the children leaving Iran has become a central feature of this case, featuring in a number of the orders that are now the subject of this committal application.
- 10 In the foregoing circumstances the mother alleges that as a result, and fearing that she would also be prohibited from leaving Iran, she left the children in the care of the maternal grandparents and returned to the United Kingdom to seek the children's return from this jurisdiction. It is the father's case that the mother abandoned the children by themselves in the airport in Tehran and boarded the flight instead of seeking the father's consent to the removal of the children from that jurisdiction, or to suspend her travel arrangements. Put in this context the father asserts that he was unaware that the mother had purchased a one way return to the United Kingdom for 3 August 2021, and she made no attempt to seek the father's consent. The father asserts the mother was caught by the authorities in Tehran trying to leave without his consent and that she boarded the aircraft leaving the children behind and thereby placing them at risk. In these circumstances the father alleges that he had to take custody of the children by default. The mother denies that she abandoned the children at Tehran Airport.
- 11 The mother contacted the authorities upon arriving in the United Kingdom and commenced custody proceedings in Iran. It was the mother's case that she withdrew those proceedings after M contacted her and she became aware that the father had been notified of the proceedings. Thereafter the mother contends that she tried to have the children returned to the United Kingdom by complying with a series of requests made by the father, including:
 - a. Not to inform the authorities especially the police, not to contest the court proceedings in Iran, and to let the father marry her there in her absence.
 - b. She started an English divorce claiming that this was (inaudible) law and paid the father's counsel tax bill of £2,200, to return the father's bank cards and identity cards.
 - c. To put her flat in Iran as a guarantee that she would not go to the police and to making claims about the wrongful retention.

- d. To move out of the family home and to return the family's car to him.

It is the father's case that the mother wanted to live a new life without the children in the United Kingdom and has been doing so since August 2021.

- 12 On 21 July 2022 the mother made an application on Form C66 seeking the return of the children to the United Kingdom. She appeared in person before Judd J on 22 July 2022 at a without notice hearing. Judd J made a passport order against the father on that date. The father travelled to the United Kingdom in August 2022 and had his documents, including his passport, seized by the tipstaff. The father's travel documents have been held by the tipstaff since that date.
- 13 The father has made his own application to commit the mother for contempt of court issued on 6 January 2023. That application alleges that the mother misled Judd J at the without notice hearing on 22 July 2022. In particular the father alleges that the mother made false statements to the court amounting to an interference with, or having a tendency to interfere with, or obstruct, the due administration of justice. The father alleges that this constitutes a contempt of court within the meaning of Rule 37.3(3) and Rule 37.3(5)(a) of the Family Procedure Rules.
- 14 In particular the father asserts that:
 - a. The mother stated that the children had been abducted and the father caused them serious risk of harm, which is untrue.
 - b. The mother did not inform the court that she had issued proceedings in Iran and abandoned them.
 - c. The mother did not inform Judd J that she was supposed to attend court in Iran on 3 August 2021 to resolve the issue between the parties in that jurisdiction.
 - d. The mother did not include in her statement or the exhibits the return tickets purchased with the assistance of the maternal grandfather at the end of August 2021, the date to which the father had consented.
 - e. The mother abandoned the children in Tehran Airport in Iran on 3 August 2021.
 - f. The mother did not inform the judge that the children had travelled to Iran on an Iranian passport and that they needed to exit with an Iranian passport.
 - g. The mother did not tell the judge that whilst in Iran the children are treated under law as Iranians, nor did she provide the court with the published information from the FCDO about the serious legal impediments of seeking the children's return from Iran to the United Kingdom.
- 15 With respect to the allegations of contempt raised against the mother by the father, the mother contends that the information was not provided to Judd J as it was irrelevant for the purpose of obtaining an emergency order in the circumstances. In any event the mother contends information was disclosed in the subsequent proceedings and considered by all the relevant judges for making orders for the return of the children. The mother further contends that the children's dual citizenship has been known throughout the proceedings and has been considered by the relevant judges in making their orders. The mother further asserts that the court was also aware throughout the proceedings that the mother had commenced proceedings in Iran, which she subsequently withdrew. Within this context the

mother denies that her actions are now an obstruction or interference with the due administration of justice.

- 16 The father's application to commit was personally served on the mother on 19 January 2023 and the court has before it a certificate of service indicating effective personal service. The application by the father to commit the mother was listed before this court for a final hearing or further directions at the discretion of the judge. I declined to deal with that application alongside the application to commit made by the mother. It is a long established principle that a committal application must be dealt with at a discrete hearing and not alongside other applications. The mother's application was listed for the final hearing and was ready to proceed. If the father seeks still to pursue his committal application in respect of the mother I will give directions for the determination of that matter at a further dispute committal hearing.
- 17 The children were made wards of court by Newton J on 18 November 2022. At that hearing Newton J made a suite of orders designed to secure the return of the children to England, including an order that the father cause children to return to this jurisdiction in advance of a final hearing so that they could properly participate in it. The order of Newton J contained a penal notice and personal service was dispensed with on the basis that the father attended at the hearing and that he was aware of, and consented to, the contents of that order, agreed to the draft, and was copied into the emails with the court filing the final version.
- 18 The order of Newton J required the father to cause the children to be returned to the care of the maternal family in Iran until they could return to England for the purposes of the final hearing. The order of Newton J further required the father to cause the children to return to England and Wales no later than 5 December 2022, again for the purposes of attending the final hearing then listed on 8 or 9 December 2022. It is of note that the order of Newton J also contained the following recitals, some of which are in fact expressed in terms of an order:

"4. The respondent father informed the court that he retained and English driving licence in the name of Ali Fakher, which he required in order to obtain the notarised agreement set out below and which he will lodge with the tipstaff by 4.00 p.m. on 22 November 2022. He confirmed he has no other identity or travel documents."

And:

"6. The respondent father, who was represented in court through solicitors and counsel has agreed to obtain initialised consent permitting the children to leave the Republic of Iran and travel to England for the purpose of attending the final hearing on 8 and 9 December 2022. That notarised agreement shall state that he unequivocally consents to the children travelling to England and Wales prior to 8 and 9 December 2022."

- 19 The genesis of the recitals concerning the notarised agreement, which thereafter informed the contents of the subsequent orders of ICC Judge Mullen, Moore J and Mr Colton KC, concerning the provision of such notarised agreement is not entirely clear. However, prior to the hearing before Newton J the father had submitted to Peele J on 16 September 2022 that the English court could not have jurisdiction to make orders in respect of the children. Within this context the father prepared a bundle on the question of jurisdiction. Within that

bundle is an extract from the Foreign Commonwealth and Development Office's website entitled, "Guidance: Iran: Child Abduction," dated 21 August 2020. A copy also finds its way into the trial prepared for this hearing. Within that guidance the following is stated:

"Where parents are unable to reach an amicable agreement regarding any matter concerning their children, these matters shall be decided upon by the Family Court. In Iranian law, a husband is the chief of his household and the relations between married couples are managed and presided over by the husband. A wife and children are bound to live and reside in the house determined by the husband, unless the choice of determining the marital house was given to the wife through legal contracts relating to the marriage.

A husband may require that his wife and children relocate to Iran - and his wife and children, after they arrive in Iran, may no longer leave Iran unless their Iranian father and husband gives them permission by signing documents before a notary public.

Boys and girls under 18 will require their father's permission to leave Iran but may get a passport and leave once they are 18 (for boys, this is so long as they have completed their military service).

For divorced couples, no foreign/UK court orders will be recognised until they have been upheld and confirmed by the Iranian Family Court, to confirm that the foreign court rulings regarding the divorce and custody of the children have been rendered in compliance with the laws of Iran."

- 20 The father was present in court when the order of Newton J was made on 18 November 2022. There has been no appeal of that order. The application to commit alleges that the father has failed to comply with the terms of the order of Newton J. The mother alleges that the father breached the order of Newton J dated 18 November 2022, requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same had been completed in that this was not provided. Following the hearing the mother alleges the father *immediately* handed to the tipstaff his driving licence, even though he required it to obtain the notarised agreement for the children to travel, thereby disabling himself in being able to provide a notarised agreement as he had agreed to do in circumstances where he had, given the execution of a passport order, no means of identifying himself to the notary.
- 21 It is further asserted that the father made no other efforts to obtain the notarised certificate, including by way of utilising the children's original birth certificates. With respect of that aspect of the order of Newton J on 18 November 2022, the father concedes that he lodged his driver's licence with the tipstaff at court on that date, rather than waiting until he had obtained the notarised agreement. The father now claims that he surrendered his driving licence before securing the notarised agreement merely because it was more convenient to do so whilst he was at court on 18 November 2022.
- 22 It is further alleged by the mother that the father is in breach of the order of Newton J, dated 18 November 2022, requiring him to cause the children to be returned to the maternal family in Iran until they were returned to England and Wales for the purpose of physically attending the final hearing on 8 and 9 December 2022 in London, and causing the children to return to the jurisdiction of England and Wales in that fashion. The father concedes that

the children were not conveyed to the maternal grandparents in Iran, nor were they returned to the United Kingdom on 5 December 2022, nor did they attend the final hearing on 8 and 9 December 2022. Rather it is apparent that they remained with the paternal grandfather, which it is alleged is in breach of para.14 and 15 of the order of Newton J to transfer them to the maternal grandparents. The mother contends that when she spoke to the paternal grandfather, he informed her that he had no intention of sending the children to the maternal grandparents because the father did not want him to and he believed that the mother had fabricated the order of Newton J. The father contends that in line with the extract from the FCDO document, "Guidance: Iran: Child Abduction," dated 21 August 2020, the fact that a wife and children are bound to live and reside in the house determined by the husband, prevented him from complying with the order of Newton J.

- 23 There was a contested final hearing in respect of the children on 8 and 9 December 2022 before ICC Judge Mullen. Following that hearing on 12 December ICC Judge Mullen ordered the children's return to England and Wales by 15 December 2022 and upon return that they be placed in the care of their mother pending further order, ICC Judge Mullen having found that the children's British and Iranian passports were in the father's control despite the father's claims to the contrary.
- 24 In line with the recital set out in the order of Newton J on 18 December 2022, ICC Judge Mullen also ordered the father to send a copy of a notarised document consenting to the children's travelling from Iran to England, immediately the same be completed. In the order of ICC Mullen, however, that order comprised part of a wider regime. In order for the father to obtain notarised consent he was required to have a means of identifying himself to a relevant notary. In the circumstances, the order of ICC Mullen also provided for the temporary release to the father's solicitor of the driving licence, on condition that the father's solicitors hold the driving licence and not release it to the father, and return it to the tipstaff by a set date. Following the hearing in December ICC Judge Mullen also extended the passport order. The order of ICC Judge Mullen again contained a penal notice and a dispensation of service in light of the father's attendance.
- 25 On 12 December 2022, ICC Judge Mullen also made a tagging order requiring the father to be the subject of an electronic tagging in the light of the flight risk he was found to present, it being said that the father has some 18 aliases, convictions for various dishonesty offences, including in relation to forgery and counterfeiting, and having changed his name by deed poll after the passport order was executed in September 2022 and obtained a driving licence dated 15 October 2022.
- 26 The father was in court when the order of ICC Judge Mullen was made on 12 December 2022. The mother asserts again that the father is in breach of the orders of ICC Judge Mullen of that date. He concedes that the children did not return to England by 15 December 2022. He also accepts that he did not provide a notarised consent for the return of the children by 30 December 2022, as specified in para.15 of the order of ICC Judge Mullen.
- 27 Having regard to the precise terms of the tagging order, the mother no longer seeks to pursue her committal application for what she alleges was a breach by the father of that order, in circumstances where he did not in the event submit to tagging. However, the father contended that the tagging order prevented him from complying with the order of ICC Judge Mullen in that the tagging company did not attend to provide a tag to him. The father alleges that the tagging company did not attend at the time specified in the order of ICC Judge Mullen, namely 7.00 p.m. on 12 December 2022, or at any other time on 12 and 13 December 2022. The father further alleges that when the tagging company did attend they

attended during a medical emergency that required him to be conveyed to hospital ambulance, and that accordingly he was not able to secure his driving licence from the tipstaff and hence was not able to secure a notarised agreement.

- 28 Within this context I pause to note at this point that, by contrast with the order subsequently made by Moore J on 16 December 2022 and Mr Colton KC on 9 January 2023, in circumstances where the father's driving licence was to be released to the solicitors for the father, rather than to the father himself, there was no link at all in ICC Judge Mullen's order between the tagging order and the arrangements for the release of the father's driving licence in order to allow him to identify himself to the notary and thereby apply with the order to provide his notarised consent.
- 29 A further hearing in this matter took place on 16 December 2022 before Moore J. At that hearing Moore J renewed the return order in respect of the children, requiring their return by 6 January 2023. Moore J also again provided for the notarised agreement and included in that order permission for the maternal grandparents to obtain replacement Iranian passports for the children. Moore J also made a further order for the imposition of tagging. Whilst the order of Moore J on 16 December was not sealed until 20 December 2022, the father was again present in court when the order was made on 16 December 2022. By her committal application the mother alleges that the father is also in breach of the order of Moore J of 16 December 2022.
- 30 Again the father concedes that the children have not returned to the jurisdiction of England and Wales. He further accepts that he has not provided a notarised consent. Once again having regard to the terms of the tagging order, the mother no longer seeks to pursue her committal application to what she alleges was a breach by the father of that order. Once again the father contends that the tagging order prevented him from complying with the other substantive orders of Moore J to return the children and to provide notarised consent.
- 31 By contrast to the order of ICC Judge Mullen, the order of Moore J *did* create a link between the tagging order and the arrangements for the release of the father's driving licence in order to allow him to identify himself to the notary and thereby comply with the order to provide his notarised consent. The order of Moore J also provided for the temporary release of the father's driving licence to the father, but on condition that that release did not take place until confirmation was received that the electronic tag had been fitted to the father. Within that context the father contends that the tagging order of Moore J prevented him from complying with the order to provide a notarised consent because the tagging company did not attend to tag him at the time specified by the tagging order of Moore J, namely on 16 December 2022 at any time before his curfew began at 10.00 p.m. on that date. Accordingly he was not able to secure his driving licence from the tipstaff and hence was not able to secure a notarised agreement.
- 32 Following the medical emergency to which I have referred, the father had been discharged from hospital at 11.52 a.m. on 15 December 2022. The records provided by the tagging company, on which the father himself relies, indicate that their representatives attended to place the electronic tag on the father at 10.40 p.m. on 15 December 2022. The father did not answer the door and a contact letter was left at his property. A further attempt was made on 16 December 2022 at 10.54 p.m., i.e. some 54 minutes after the curfew began having regard to the terms of the order of Moore J. A further visit was made by the tagging company on 19 December 2022 at 11.19 p.m. and again there was no answer. The same result was obtained on 20 December 2022 at 10.03 p.m. and 21 December 2022 at 10.00 p.m. Again there was no answer. By contrast the father contended that the tagging company did not attend his home on 15 or 16 December 2022, or on any other date after 18 December 2022.

- 33 On 9 January 2023 the matter came before Mr Colton KC, sitting as a Deputy High Court Judge. At that hearing the court made a further order against the father, this time requiring the children to return to the jurisdiction of England and Wales by 19 January 2023. Mr Colton KC also made a further order requiring the father to send a copy of a notarised document consenting to the children travelling from Iran to England immediately the same had been completed. Mr Colton KC continued the tagging order made by Moore J. By this stage an application for costs had been made by the mother and the judge awarded costs against the father in the sum of £1,000. The father has not paid that costs order to date.
- 34 During the course of the hearing, on behalf of the mother, Mr Basi accepted that it was not appropriate to seek to enforce that costs order by way of an application for committal to prison, and that element of the contempt application of the mother is not pursued.
- 35 The father was present in court when Mr Colton KC made his order on 9 January 2023. Once again the mother asserts that the father is in breach of that order. Again the father concedes that the children have not returned to the jurisdiction of England and Wales. He again further accepts that he has not provided a notarised consent. Once again, having regard to the terms of the tagging order, the mother no longer seeks to pursue her committal application for what she alleges was a breach by the father of that order of Mr Colton KC. Once again the father contends that the tagging order prevented him from complying with the substantive orders of Mr Colton KC to return the children and to provide a notarised consent.
- 36 Again, by contrast to the order of ICC Judge Mullen, but in line with the orders of Moore J, the orders of Mr Colton KC did create a link between the tagging order and the arrangements for the release of the father's driving licence in order to allow him to identify himself to the notary and thereby comply with the order to provide his notarised consent. As with the order of Moore J, the order of Mr Colton KC also provided for the temporary release of the father's driving licence to the father, on condition that that release did not take place until confirmation was received that the electronic tag had been fitted to the father. In this context, the father again contended that the tagging order of Mr Colton KC prevented him from complying with the order to provide a notarised consent, because the tagging company did not attend to tag him at the time specified by the tagging order of Mr Colton KC; namely on 9 January 2023 between 6.00 p.m. and 9.30 p.m., the curfew to begin at 10.00 p.m. on that date. Accordingly he was not able to secure his driving licence from the tipstaff and hence he was not able to secure a notarised consent.
- 37 The records from the tagging company, again on which the father relies, record that the tagging company attended at the father's property at 11.29 p.m. on 9 January 2023, i.e. some one hour and 29 minutes after the curfew was due to commence. They received no answer from the father's property and a letter was left. A further attempt was made on 10 January 2023 at 10.09 p.m. with the same results, and again on 11 January 2023 at 11.27 p.m., again with the same result. The father concedes that representatives of the tagging company attended his property twice in the month of January but in the circumstances where they turned up after 10.00 p.m., this is at a time "when it is time for any decent human being to be asleep." The father contends that whilst he tried to ring the number on the letter that was left, there was no answer.
- 38 The matter came before Theis J on 24 January 2023. Theis J did not renew the order for electronic tagging of curfew but made an additional order in respect of the return of the children and an order requiring the father to complete the notarised document, with the child's solicitor to accompany him with the driver's licence. It is clear from the recital to the

order made by Theis J on 24 January 2023 that the father informed the court on that date that he did not intend to comply with the directions requiring him to execute a notarised agreement, did not agree to submit to electronic tagging and did not agree to effect the return of the children from Iran. Instead he sought the return of his passport so he could travel to Iran.

39 By the time the matter came before Theis J, the father had sought permission to appeal both the order of ICC Judge Mullen on 12 December 2022 and Moore J's order of 16 December 2022. The father's application for a stay on those orders was refused by the Court of Appeal. On 9 February 2023 the Court of Appeal refused permission to appeal the orders of ICC Judge Mullen and the order of Moore J.

40 Within the context I have described the mother now seeks to commit the father to prison for breaching the orders of the court, which breaches are itemised in the Grounds of Committal document dated 24 January 2023 as follows:

- a. The father is in breach of the order of Newton J dated 18 November 2022, requiring him to send a copy of a notarised document consenting for the children travelling from Iran to England, immediately the same has been completed.
- b. The father is in breach of the order of Newton J dated 18 November 2022 requiring him to cause the children to be returned to the maternal family in Iran, until they return to England and Wales for the purpose of physically attending the final hearing on 8 and 9 December 2022 in London.
- c. The father is in breach of the order of Newton J dated 18 November 2022 requiring him to cause the children to be returned to the jurisdiction of England and Wales by no later than 5 December 2022.
- d. The father is in breach of the order of ICC Judge Mullen dated 12 December 2022, requiring him to return the children to the jurisdiction of England and Wales by 15 December 2022, and upon return place them in the care of their mother pending further order.
- e. The father is in breach of the order of ICC Judge Mullen dated 12 December 2022, requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same has been completed.
- f. The father is in breach of the order of Moore J dated 16 December 2022 requiring him to return the children to the jurisdiction of England and Wales by 6 January 2023, and upon return place them in the care of their mother pending further order.
- g. The father is in breach of the order of Moore J dated 16 December 2022 requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same has been completed.
- h. The father is in breach of the order of Mr Colton KC dated 9 January 2023 requiring him to return the children to the jurisdiction of England and Wales by 19 January 2023 and upon return placing them in the care of their mother pending further order.

i. The father is in breach of the order of Mr Colton KC dated 9 January 2023 requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same has been completed.

41 The grounds for committal were personally served on the father by way of a process server on 2 February 2023 at 9.29 a.m. The court has before it a witness statement evidencing that service. There was also in the bundle a Mimecast document indicating that the father downloaded the committal documents. A notice of the hearing at which I heard submissions was issued on 8 February 2023. The matter has been listed in open court and I am satisfied that the father received proper notice of the hearing.

42 As I have noted before Theis J the father stated that he has no intention of complying with any orders of this court, speaking as he does before the jurisdiction. At the hearing, through Mr Lennard, the father repeated that position to this court. In the circumstances I am satisfied that the father will continue to refuse to comply with the orders of this court were he to be given a further opportunity to do so.

43 With respect to the law and procedure the court must apply, the process of committal for contempt is a technical one and of some little complexity. In that context it is important, in circumstances where the liberty of the citizen is at stake, to recall the strict procedural requirements that properly constituted committal hearing that have to be applied with in respect of the local authority's application to commit the parents for contempt. I have in particular borne in mind the following requirements:

a. The committal application must be dealt with at a discrete hearing and not alongside other applications.

b. The alleged contempt must be set out clearly in a notice of application or document, for summons or notice identifying separately and numerically each alleged act of contempt.

c. The application notice of document setting out separately each allege contempt must be proved to have been served on the respondent in accordance with the rules.

d. The respondent must be given the opportunity to secure legal representation as he or she is entitled to.

e. The committal hearing must be listed publicly in accordance with the Lord Chief Justice's Practice Direction, Committal for Contempt of Court, Open Court, 26 March 2015, as amended on 20 August 2020, and should ordinarily be held in open court.

f. Consideration must be given to whether the allocated judge should hear the committal or whether the committal application should be allocated to another judge.

g. The burden of proving any alleged contempt lies on the person or authority alleging the contempt.

h. The respondent is in entitled, subject to the case management powers of the court, to cross-examine witnesses, call evidence and to make submissions of no case to answer.

i. The alleged contempt must be proved to the criminal standard, i.e. beyond reasonable doubt.

- j. The respondent must be advised that his or her rights remain silent and informed that he or she is not obliged to give evidence in his or her own defence.
- k. Where contempt is found proved on the criminal standard, the committal order must set out the findings made by the court that establishes contempt.
- l. Sentencing should proceed as a separate and discrete exercise with a break between the committal decision and the sentencing of the contemnor. The contemnor must be allowed to address the court by way of mitigation or to purge his or her contempt.
- m. The court can order imprisonment, immediate or suspended, and/or a fine, or a general consideration of penalty for a fixed period or enlarge the injunction.
- n. In sentencing the contemnor the disposal must be proportionate to the seriousness of the contempt, reflect the court's disapproval and be designed to secure compliance in the future. Committal to prison is appropriate only when no reasonable alternative exists, where the sentence is suspended or adjourned and the precise terms for activation must be identified.
- o. The court should briefly explain its reasons for the disposal it decides to impose if it finds that the contempt is proved.

In this case I am satisfied that the foregoing procedural imperatives have been met ahead of and during the hearing.

- 44 Having listened carefully to the submissions made by the parties and having regard in particular to the concessions made by father with respect to (a) the current whereabouts of the children, and (b) the absence of a notarised consent, I am satisfied beyond reasonable doubt that the father has breached the orders of this court. My reasons for so deciding are as follows.
- 45 The requirement of each of the orders in issue before this court are plain, with respect to the father being required to provide a notarised agreement, providing his consent to the children leaving the jurisdiction of Iran, and with respect to causing the children to be returned to the jurisdiction of England and Wales. Within that context the father does not seek to dispute either that he has failed to provide a notarised agreement or that the children remain in the jurisdiction of Iran. Indeed he has conceded this much before the court. In the circumstances I am satisfied that *prima facie*, and beyond reasonable doubt, that the father has failed to comply with the orders of the court and is in breach of those orders.
- 46 The father's defence to his failure to comply with the orders of the court is in essence that it has not been possible for him to so comply. In short, the father contends that he has not been in a position to comply with the orders to provide a notarised consent to the children leaving Iran, and hence it has not been possible for him to comply with the orders to cause the children to return to the jurisdiction of England and Wales from Iran.
- 47 Dealing with the father's defence in more detail, he contends that he was not able to comply with the order to provide a notarised agreement because he did not have available to him his driving licence, which would have allowed him to identify himself to a notary in circumstances where his passport has been seized. With respect to the order of Newton J, the father contends in this regard that this order requires him to surrender his driving licence, which he did on the day of the hearing. With respect to the subsequent orders of

ICC Judge Mullen, Moor J and Mr Colton KC, the father contends that the wording of those orders regarding tagging and the failure on the part of the tagging company meant that he continued to be unable to retrieve his driving licence. I reject each of those contentions.

- 48 With respect to the order of Newton J, that order allowed the father a number of days in possession of his driving licence in order to secure the notarised agreement, with the father required to surrender his driving licence four days after the hearing on 18 November. As I have noted, the father concedes however that he lodged his driving licence with the tipstaff immediately whilst in court on 18 November rather than waiting until he had obtained the notarised agreement, as the order provided a period of time for him to do. Whilst, as I have recounted, the father now claims that he surrendered his driving licence before securing the notarised consent because it was more convenient for him to do so whilst on court on 18 November 2022, I reject that assertion.
- 49 I am satisfied that he did so in order to frustrate his own ability to obtain the notarised agreement ordered by Newton J, and hence to frustrate his ability to cause the return of the children to this jurisdiction. The father does not dispute that he did not provide a notarised agreement pursuant to the order of Newton J and did not cause the children to be returned to this jurisdiction pursuant to that order. In all those circumstances he is plainly, and beyond reasonable doubt, in breach of that order.
- 50 With respect to the order of ICC Judge Mullen, the father contends that the wording of that order, insofar as it concerned tagging, prevented the father from obtaining his driving licence as by the terms of the order he was not permitted to obtain the driving licence until he was tagged. Due to the failure on the part of the tagging company he was never tagged. He was thus unable to secure his driving licence and obtain the notarised agreement.
- 51 As I have already noted, unlike the subsequent orders of Moore J and Mr Colton KC, there was in fact no link made by the order of ICC Judge Mullen between the father obtaining his driving licence in order to secure the notarised agreement and the operation of the tagging provisions of the order. By contrast with the orders subsequently made by Moore J on 16 December 2022 and Mr Colton KC on 9 January 2023, the father's driving licence was to be released to the *solicitors* for the father rather than to the father himself. There was no link at all in ICC Judge Mullen's orders between the tagging order and the arrangements for the release of the father's driving licence, in order to allow him to identify himself to the notary, and thereby comply with the order to provide the notarised agreement. In the circumstances the fact that the father was not tagged did not, under the terms of ICC Judge Mullen's order prevent him from complying with the latter order. Notwithstanding this the father failed to provide a notarised agreement.
- 52 The father is correct in his assertion that there *was* a link in both the order of Moore J and the order of Mr Colton KC between the tagging order and the ability of the father to obtain his driving licence in order to identify himself to the notary. Those orders did create a link between the tagging order and the arrangements for the release of the father's driving licence in order to allow him to identify himself to the notary and thereby comply with the order to provide his notarised agreement. They provided for the temporary release of the father's driving licence to the father on condition that that release did not take place until confirmation was received that the electronic tag had been fitted to the father. In these circumstances the father contends that the tagging order of Moore J and Mr Colton KC prevented him from complying with the order to provide a notarised consent, because the tagging company did not attend to tag him at the time specified by the tagging order. I reject the father's contention that it was the conduct of the tagging company that prevented his compliance with the orders.

- 53 The time specified by the tagging order of Moore J for the father to be tagged was any time before the curfew began at 10.00 p.m. on 16 December 2022. As I have noted, the father had been discharged from hospital following the medical emergency referred to in his judgment at 11.52 a.m. on 15 December 2022. The records provided by the tagging company, again on which the father himself relies and does not dispute, indicate that their representatives attended to place the electronic tag on the father at 10.40 p.m. on 15 December 2022. The father did not answer the door and a contact letter was left at the property. A further attempt was made on 16 December 2022 at 10.54 p.m., and further attempts were made on 19 December 2022 at 11.19 p.m., 20 December at 10.03 p.m. and 23 December at 10.00 p.m. On each occasion there was no answer and on each occasion it was not possible therefore for the tag to be fitted.
- 54 The time specified in the order of Mr Colton KC for tagging was between 6.00 p.m. and 9.30 p.m. on 9 January 2023. The records from the tagging company indicate that the tagging company attended the father's operation at 11.29 p.m. on 9 January 2023. They received no answer from the property and a letter was left. A further attempt was made on 10 January 2023 at 10.09 with the same results, and again on 11 January at 11.27 p.m. with the same results. The father concedes himself that representatives from the tagging company attended his property twice in the month of January.
- 55 In the foregoing context, I am satisfied that the father sought to avoid being tagged as a means of frustrating the order of the court. In respect of the order of Moore J, the tagging company had made a prior attempt to tag the father at 10.40 p.m. on 15 December 2022. Within the time that had been set by Moore J and continued to make repeated attempts to do so after that time. With respect to the order of Mr Colton KC, whilst the evidence indicates that the tagging company were late by an hour and an half by reference to the tagging time specified in the order, it would surely be an undesirable counsel of perfection to hold that the order of Mr Colton KC was not able to have been complied with by reason of a tagging company being an hour and a half late. Indeed it would be a charter to frustrate unjustifiably the operation of such orders as I am satisfied the father proceeded to do, particularly in circumstances where the tagging company thereafter made repeated attempts to tag the father, albeit without success.
- 56 For all these reasons I am satisfied that the father has no defence for his failure to comply with the terms of the orders of Newton J, ICC Judge Mullen, Moore J and Mr Colton KC. The terms of their orders were clear, requiring the father to provide a notarised agreement consenting for the children leaving Iran, and thereafter cause for returning the children to this jurisdiction. The father concedes that he has done neither of these things despite no less than four orders requiring him to do so.
- 57 In the circumstances I am satisfied that the following findings are made out beyond reasonable doubt:
- a. The father has breached the order from Newton J dated 18 November 2022 requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same has been completed.
 - b. The father has breached the order of Newton J dated 18 November 2022 requiring him to cause the children to be returned to the maternal family in Iran until they return to England and Wales for the purpose of physically attending the final hearing on 8 and 9 December 2022 in London.

- c. The father has breached the order of Newton J dated 18 November 2022 requiring him to cause the children to be returned to the jurisdiction of England and Wales by no later than 5 December 2022.
- d. The father has breached the order of ICC Judge Mullen dated 12 December 2022 requiring him return the children to the jurisdiction of England and Wales by 15 December 2022 and upon return to place them in the care of their mother pending a further hearing.
- e. The father has breached the order of ICC Judge Mullen dated 12 December 2022 requiring him to send a copy of a notarised agreement consenting to the children travelling from Iran to England, and immediately the same has been completed.
- f. The father has breached the order of Moore J dated 16 December 2022 requiring him to return the children to the jurisdiction of England and Wales by 6 January 2023, and upon return place them in the care of their mother pending further order.
- g. The father has breached the order of Moore J dated 16 December 2022 requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, and immediately the same can be completed.
- h. The father has breached the order of Mr Colton KC dated 9 January 2023 requiring him to return the children to the jurisdiction of England and Wales by 19 January 2023, and on return placing them in the care of mother pending further order.
- i. The father breached the order of Mr Colton KC dated 9 January 2023 requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same has been completed.

MR JUSTICE MACDONALD: Mr Lennard, I will now rise to allow you to consider with your client any submission you seek to make in mitigation.

[LATER]

- 61 Having made findings in respect of contempt of court, I adjourned the case for a short period to permit the father to consider any submissions that he wished to make by way of mitigation.
- 62 The general legal principles applicable to sentencing of a contemnor are now well established and can be summarised as follows.
 - a. The court can order imprisonment, immediate or suspended, and/or a fine, or adjourn consideration of penalty for a fixed period or enlarge(?) the injunction.
 - b. In sentencing the contemnor, the disposal must be proportionate to the seriousness of the contempt, reflect the court's disapproval and be designed to secure compliance in the future.
 - c. Committal to prison is appropriate only where no reasonable alternative exists.

- d. Where the sentence is suspended or adjourned, the period of suspension or adjournment and the precise terms for activation must be specified.
- e. Imprisonment is not the starting point and is not the automatic response to a contempt of court.
- f. Equally, there is no principle that a sentence of imprisonment could not be imposed on a contemnor who has not previously committed a contempt.
- g. In assessing the seriousness of the contempt, it is right to have regard to the purpose for which it was committed and the likelihood of any risk to the process of justice.
- h. In circumstances where the disposal chosen must be proportionate to the seriousness of the contempt where an immediate term of imprisonment is appropriate it should be as short as possible, having regard to the gravity of the contempt, and must bear some reasonable relationship to the maximum sentence of two years imprisonment that is available to the court.
- i. Where a term of imprisonment is the appropriate sentence, the length of the term should be determined without reference to whether that term is to be suspended or not.
- j. Having determined the length of the term of imprisonment, the court should expressly ask itself whether a sentence of imprisonment might be suspended. The power of the Family Court to suspend a sentence is separate from the power of the criminal to suspend the sentence. In particular, in the Family Court, the sentence may be suspended on terms.
- k. The court should briefly explain its reasons for the disposal it decides to impose it if finds the contempt proved.

63 As Marcus Smith J made clear in *Patel v Patel & Ors.* [2017] EWHC 3229 (Ch) at [22] and [23] a penalty for contempt has two primary functions. First, it upholds the authority of the court by marking the disapproval of the court and deterring others from engaging in conduct comprising contempt. Secondly, it acts to ensure future compliance. In some cases, therefore, and, in particular, those cases where the contempt arises from a breach of the court order, a penalty will have the primary objective of ensuring future compliance with that order.

64 With respect to the father, I have found as a fact that he is in breach of no less than four court orders made by the High Court that he provide a notarised agreement giving his consent to the children leaving the jurisdiction of Iran and thereafter to cause the children to return to this jurisdiction.

65 With respect to mitigating factors for those breaches, Mr Lennard urges me to take account of the father's age of 57 years and 58 later this year in July, to also take account of the fact that the father has a son and daughter, one of whom is young, and that the children are very sensitive to the outcome of these proceedings. In particular, Mr Lennard invites me to take

account of the fact that M does not wish for his father to go to prison as a result of his continued and contumelious breaches of court orders.

- 66 Likewise, it is pointed out to me by Mr Lennard, quite correctly, that the mother has indicated at stages in these proceedings that she does not wish to pursue the contempt application to the extent that she seeks the imprisonment of the father.
- 67 Finally, Mr Lennard urges me to have regard to the fact that certain of the alleged breaches in the committal notice, in particular, those concerned with tagging and costs, were not pursued by the mother at this hearing, thereby reducing the seriousness of all of the breaches before the court. I have, of course, considered very carefully those mitigating factors.
- 68 However, against this, I am satisfied that in this case there are very significant aggravating factors. The aggravating factors in this case include the repeated breaches of court orders over an extended period of time. The father has deliberately, in my judgment, failed to comply with no less than four orders of the High Court, despite repeated opportunities being given to him by this court to allow compliance. Notwithstanding those repeated opportunities, the father has repeatedly set his face, deliberately, against the compliance with the orders of the High Court.
- 69 A further aggravating factor in this case is what I am satisfied has been the father's wilful acting in a manner designed to make compliance with the orders difficult or impossible as a result of his own conduct. In particular, his early surrendering of his driving licence under the order of Newton J and his lawful misinterpretation of the order of ICC Judge Mullen with respect to tagging and his repeated avoidance of the representatives of the tagging company when they made repeated attempts to tag him.
- 70 Finally, I am satisfied that an additional aggravating factor in this case is the father's statements, both to this court and previous courts, that he has absolutely no intention of complying with the orders of the court. Those assertions have been given without caveat. The continued multiple breaches, it must also be noted, have left the children stranded in the jurisdiction of Iran for an extended period.
- 71 Having regard to the aggravating and mitigating factors in this case, to the principles of sentencing that I have outlined which I have careful regard to and to the function of the sentence in first marking the disapproval of the court and deterring others from engaging in the conduct comprising the contempt and, second, to ensure future compliance, I am satisfied that the starting point in this case for an appropriate sentence for the breach of the orders must be one of custody. I am further satisfied that the appropriate sentence in this case is one of 6 months' imprisonment.
- 72 I have given some consideration to suspending the sentence of imprisonment with a view to securing the father's compliance with the orders of the court. However, in circumstances where the father has repeated to this court his settled intention not to comply with the orders of the court such a suspension would, in my judgment, serve no purpose, and certainly not serve its intended purpose.
- 73 In the circumstances, after careful consideration, I do not consider this an appropriate case in which to suspend the sentence of imprisonment that I have passed, and such sentence will therefore be immediate.

- 74 In addition, I will make a further order under the inherent jurisdiction requiring the father to facilitate the return of the children to the jurisdiction of England and Wales forthwith and provide a notarised agreement in that regard.
- 75 It will, of course, be open to the father to apply to purge his contempt of court and, hence, to secure his release from custody if the children are returned to the jurisdiction of England and Wales pursuant to the return order. To this end, if the father evinces an intention now to comply with the order to provide a notarised agreement, I intend to direct that the solicitor for the child attend the prison in which the father is held with his driving licence and a notary public in order that that document can now be completed.
- 76 If the children are not returned to England and Wales in breach of that order, it will be open to the mother to make a further application to commit the father for the breach of that order, at which time he will be liable to a further period of imprisonment if he is once again found in contempt.
- 77 I advise the father that he is able to apply to purge his contempt, in particular, should the children be returned to the jurisdiction as ordered by the court.
- 78 That is my judgment. Please, take him down.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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