Neutral Citation Number: [2020] EWHC 1903 (Fam)

Case No: FD20P00173

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2020

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between:

NT	**Applicant**
- and -	
LT	**Respondent**

- -

NT v LT (Return to Russia)

- -

Richard Harrison QC and George Gordon (instructed by **Goodman Ray**) for NT, the Applicant (mother)
James Turner QC (instructed by **Charles Russell Speechlys LLP**) for LT, the Respondent (father)

Hearing dates: 10 and 11 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE COBB

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.

The Honourable Mr Justice Cobb:

1. The applications before the court for determination are:

   i) an application brought under the *Child Abduction and Custody Act 1985* (incorporating the *Hague Convention on the Civil Aspects of International Child Abduction 1980*) (the '*1980 Hague Convention*') dated 25 March 2020;

   and in the alternative,

   ii) an application brought under the inherent jurisdiction.

   These applications, brought by the children's mother ("the mother") pursue the same objective, namely the return of her son, K, currently aged 8, to the Federation of Russia. K has an older sister (L) who is just 16 years old, and is not the subject of these applications. The mother contends that the children's father ("the father") wrongfully removed K from Russia on 4 July 2019, or in the alternative has wrongfully retained K away from Russia in either late-August, September, or October 2019. Her primary case is that the *1980 Hague Convention* provides appropriate jurisdiction to achieve K's summary return. She resorts to arguments based on the inherent jurisdiction in the event that I conclude that the *1980 Hague Convention* is not engaged.

2. The father opposes these applications and seeks their dismissal. He has made his own applications before the English court (in fact they are first in time, issued on 20 February 2020), for various private law orders (principally prohibited steps orders) under the *Children Act 1989*; his applications have, for the time being, been stayed pending determination of the mother's applications.

3. The father raises widespread challenge to the mother's claims. The essential questions for my determination are:

   i) Whether K was habitually resident in Russia at the time of the relevant removal or retention;

   ii) If K had been habitually resident in Russia immediately before his removal or retention from that country, whether the mother had rights of custody in respect of K at the relevant time, in the sense of the father requiring her consent (or permission from the courts in Russia) for the relevant removal or retention;

   iii) If the *1980 Hague Convention* is thus engaged,

a) whether there is a grave risk that the return of K to Russia would expose him to physical or psychological harm or otherwise place him in an intolerable situation;

b) whether K objects to being returned to Russia and has attained an age and degree of maturity at which it is appropriate to take account of his views;

iv) If the 'grave risk' and/or 'child objections' gateways are passed, whether the court should exercise its discretion in favour of, or against, making a return order.

4. For the purposes of determining these applications, I have read a large volume of documentary material, in two separate bundles, in total running to some 700 or so pages. I have received characteristically able, and forceful, submissions from leading counsel for the parties. This was a case in which many key substantive and procedural issues were disputed.

5. I conducted a Pre-Trial Review ('PTR') some weeks ago (22 May 2020), at which I gave directions for the final collation of the evidence. Two important further case management issues arose on the first day of this two-day final hearing which required my immediate adjudication. I gave my decisions on these issues, *ex tempore*, indicating that I would set out my reasons for my decisions in this judgment. As these were discrete points, I consider it more convenient to attach my judgment on these case management issues as an appendix to this substantive judgment.

Background history

6. The case has a lengthy and complex history which it is necessary to recount in a little detail.

7. The father is 50 years old; the mother is 45. They are both Russian citizens, and also have St Kitts & Nevis Citizenship through the Citizenship Investment Scheme. They married in 2004. The father owns businesses and properties in Russia, including a flat in St Petersburg and a dacha outside of St Petersburg. Their only children together are K and L; the father has an older child or children, and a younger child or children, by different partners. For most of their married life they lived in St Petersburg, in a property now owned by the mother; the extended families on both sides live in St Petersburg. During the marriage, the parties also owned a property in London, now transferred to the mother. K's first language is Russian, although he is fluent in English. K was born in London.

8. In 2014, the mother and children relocated to London. The father, although travelling extensively for business at that time, joined them in London for periods of time. During this period, the mother asserts that she and the children frequently travelled to Russia, in part to see the paternal and maternal extended family. In 2017, the parties entered into a nuptial agreement in Russia which provided for the transfer of the property in London and a property in Russia to the mother. Divorce proceedings followed; the father issued proceedings in Russia and the mother in England. The jurisdictional conflict was effectively resolved when the Russian court pronounced the decree on 23 October 2017 which was made final in February 2018.

9. In 2017, both parties issued applications under the *Children Act 1989* in the Central Family Court in respect of child arrangements for the children. The mother sought orders which would have secured the children living with her in London; the father wished the children to live with him in Russia.

10. In April 2018, shortly before the final hearing of the *Children Act 1989* applications, the mother travelled to Russia leaving the children in England in the care of the maternal grandmother and a nanny. On her arrival in Russia, she was arrested and subsequently charged with an offence of bribery of an official "on a large scale"; specifically it was alleged that she had attempted to suborn a police officer (with US$10,000) to bring a criminal case against the father. She was remanded in custody in a pre-trial detention centre. The father, who had been in Russia at the time, travelled to London to care for the children, and rented a flat in Hampstead for the following three months. At that time, he was reliant on a tourist visa, and otherwise dependent on the status of the mother who had the greater security of a Tier 1 investor visa.

11. In June 2018, the *Children Act 1989* proceedings were listed before District Judge (DJ) Gibson for final hearing; the mother was still in custody in Russia and not able to attend in person. She applied (through solicitors, instructing Mr Harrison QC) for an adjournment. This was in fact the second such application. The application failed, and the mother's lawyers withdrew. The case proceeded. DJ Gibson heard evidence from the father, from an independent social worker, Ms Cathy King, and an immigration expert. Ms King provided significant evidence to the court; she had prepared three reports, having met with the children and parents in England and in Russia. She raised a number of serious concerns about the wellbeing of the children. I have read those detailed reports: for present purposes, it is sufficient to record (as Ms Demery, Family Court Adviser in these proceedings, says in her report to this court) that Ms King was "critical of both parents. Both children appeared to have been drawn into the parental conflict following their parents' separation. [K] did not speak with much affection about either parent". Ms King had also made clear in her report that the father intended to return to Russia (the "father cannot reside in this country because of work commitments in Russia"); she reflected in the first of her three reports (which had been filed before the mother's arrest) that it was the mother's intention to return to Russia herself if the father was successful in his application before the English Court.

12. DJ Gibson ruled on the cross-applications. She found that the children were thriving in the recent care of the father, and her order, dated 17 July 2018, provided for the children to live with him. He was granted permission to remove the children permanently to live in the Russian Federation with effect from 28 July 2018. The judge gave a fully reasoned and detailed judgment; it is material to highlight three of the judge's findings:

> "There is a strong argument that as the children are Russian, their ethnic and cultural needs are best met in Russia…";
>
> "The father has in the past indicated that he can work remotely but in reality, the extended family and his business interests are all in Russia."

> "These are Russian children... Russia is their home country by both birth[1] and early upbringing."

13. In concluding her judgment, DJ Gibson explicitly contemplated that once the children relocated to Russia with their father, the children would become habitually resident in Russia, and that the Russian courts would assume jurisdiction for them. I do not regard this forecast as binding on me, but it provides some further illumination on how the court had viewed the father's intentions for the permanent relocation of K in Russia at that time.

14. As I said, the mother had played no active part in the final hearing. The judge nonetheless made critical findings about her; these findings related both to her treatment of the two children, and in the way in which she had litigated in the English courts; the judge referred to occasions when the mother had demonstrably misled the court; the judge further referred to the mother's "calculated deceit" in her evidence about the whereabouts of birth certificates and associated documents ("this was not spur of the moment lying"). Despite these findings, the judge made orders for extensive contact, including staying contact for half of each holidays, between the children and their mother. The order further provided for K to attend a named school/Academic Gymnasium in St Petersburg from September 2018 and (by consent) for L to attend a named private boarding school in England.

15. As planned, on 29 July 2018, the father left London with K and L. They spent some time during the summer in France before returning to Russia; they moved to live at the father's country home, his dacha, outside St Petersburg. At the beginning of the school academic year, L returned to England to commence boarding school, whereas K began school/Gymnasium in St Petersburg. K attended the Russian school throughout the academic year 2018-2019.

16. On 5 September 2018, the mother pleaded guilty to the bribery charges; she was sentenced to four years imprisonment, and received a significant fine. Notwithstanding her plea, it is the mother's case now that the father orchestrated the allegation of bribery, and she asserts and maintains her innocence of the charge. In 2019 she mounted an appeal, and on 21 August 2019 her charge was reduced to attempted bribery and she was immediately released from prison. Under the terms of the revised sentence the mother is due to be recalled to prison when K is 14 years old; she continues to live in St Petersburg.

17. The father's case is that K, having lived in England since he was three years old, did not settle into his new life in Russia. Accordingly, the father maintains, by December 2018, he started thinking seriously about returning to live in England, where he and K could be closer to L. There is limited evidence before the court that the father took any steps to advance that plan either during the autumn of 2018 or indeed during the first six months of 2019. I address this below.

18. On 4 July 2019, the father and K left Russia; they spent a summer holiday in France near to Monaco. At that time, there were no proceedings in the Russian family courts concerning K, there were no family court orders, and specifically there was no prohibition on them leaving the country. As it happens, the mother subsequently

[1] By which she meant parentage.

issued proceedings (see [25] below) and applied for a travel ban which was granted on 30 January 2020.

19. Later in the same month (on 30 July 2019, to be precise), the father initiated correspondence with a private preparatory day-school in London stating he was "considering the possibility" of moving back to London, and of K attending the school (see [45] further below). At the end of August, the father and children travelled from France to London. L returned to her boarding school for the start of the new academic year. K has not returned to Russia since July 2019.

20. The mother was apparently unaware of (a) the removal of K from his school in St Petersburg at the end of the summer term 2019; (b) K's summer holiday in France with his father; (c) the approach to the London day-school. On 3 September, she sent the father an e-mail or text message asking where K was, and why he was not in school in Russia; the father replied:

> "OUR son is fine, he is healthy. He's undergoing a routine spinal exam (inheritance from you). He's doing his lessons, he's in touch with his teacher. Regarding the meeting[2], we'll discuss it later, read the court decision. I'm still waiting for your answer about the ban on the departure of children[3]. Please stop clown about the school. I suppose your messages are already enough for a tick in the proper behaviour log for your suspension[4]".

The mother responded:

> "Where's [K] now? What's wrong with his spine? What kind of examination is he getting and where?"

The father did not reply. On the following day, the mother sent the father a further message:

> "You must inform me about the health of the children! If [K] is undergoing an examination, which one? In detail, by giving me the results of this examination. And at the same time, let me know: is he being treated for his back or a tooth he knocked out while he was on holiday with you? I'm worried about my baby, and it's okay, because I'm his mother. don't blame me for anything and create a conflict situation with children involved."

The father did not reply.

21. On 10 September, K and his father flew to Barbados and then onto the United Arab Emirates for a total period of one month; the purpose of the trip is not clear, but it is now reasonably apparent that this was to allow them to re-enter the UK on a UK

[2] This was a reference to a parent/teacher meeting at the school.
[3] The father had asked whether the mother had placed a ban on his travel from the country.
[4] i.e. of the prison sentence.

Investor visa. On the following day, the father wrote to K's school/Gymnasium in St Petersburg as follows:

> "K's absence from school is due to the need for dental treatment and back examination because of diagnosed scoliosis to get the opinion of foreign specialists. The appointment during school hours is due to the working hours of the relevant medical facilities and the sudden need for dental treatment".

22. On 12 September, following an assessment at the London day-school, K was offered a place to start straight away. The father wrote to the mother two days later (14 September); he did not refer to K starting at the London school and led her to believe that K would be returning to the school/Gymnasium in St Petersburg:

> "… we warned the school[5] and you that we would be gone 2-3 weeks… In summer [K] was engaged in mathematics, English, spelling, performed all school tasks for the summer (reading, writing). Therefore, the delay in school should not affect performance…"

23. The mother was, at this time, still unaware of K's whereabouts and deployed the services of various agencies in an effort to find him, including the Local Guardianship Department, the Intra-city Municipal Entity of St Petersburg, the Department of Internal Affairs, and the Border Services of the Federal Security Service for St Petersburg. Testy correspondence passed between the parties which has been filed with this court. I have read some of it. On 21 September, the mother asked the father "where's my child?" The father again did not reply to this question.

24. On 14 October K started at the London day-school. The father finally disclosed an address for K to the mother on 20 February 2020 when he served her solicitors with his application for a Child Arrangements Order. K has not seen his mother since she left England in April 2018, and while she was in prison spoke to her by telephone on very few occasions.

Russian family proceedings

25. On 31 October 2019, the mother issued proceedings in the Petrogradsky District Court in St Petersburg, inviting the court to determine living arrangements for K and L. At that time, she had no knowledge of K's whereabouts. On 1 November, Judge Mazneva accepted jurisdiction to determine the mother's application; this is not of itself surprising given the terms of DJ Gibson's order[6]. In December 2019, the mother amended her application to seek an 'interim residence order'. Reports were prepared in respect of that application; the relevant local authority apparently supported the mother's claim for residence as did the court appointed Children's Ombudsman, though the authors of both reports had not received the benefit of any

[5] i.e. in St Petersburg

[6] It is not in fact clear whether the Russian court was aware of the 2018 order of the English court (DJ Gibson). The father accuses the mother of doctoring the order, about which I can make no finding.

input from the father or the children. The father responded by seeking to have the proceedings brought to an end, but his efforts failed.

26. Within the proceedings, on 22 January 2020, Judge Mazneva made a formal request to the Russian Embassy in London inviting assistance with the commissioning of a report upon the children. The father personally responded to this request by instructing Ms King to prepare a further report for the Russian proceedings. Although the letter of instruction for Ms King was drafted by the father's lawyers, separately the father wrote directly to Ms King (31 January 2020) in these terms "[t]he report for the Russian court should not be long and profound as it was for the English court". Ms King prepared a report, without any input from the mother or her lawyers, and indeed without their knowledge. This report contains the children's views about their current situation (as of February 2020) and about their futures. They record their antipathy towards their mother, and love for their father.

27. On 25 February, having seen the report of Ms King, along with the Russian reports, Judge Mazneva refused the mother's application for an interim residence order.

28. On 5 March, the Petrogradsky District Court in St Petersburg directed a psychological evaluation of the family by a court appointed expert ("PetroExpert"). This has not yet been actioned.

Further English family proceedings (2020)

29. In the meantime, on the 21 February 2020, the father made an application on very short notice in the Urgent Applications' Court at the Royal Courts of Justice, seeking a prohibited steps order, to prevent the mother from removing the children from the father's care, or from the jurisdiction, or attending at either child's school. I was the Urgent Applications Judge on that day; Miss Scriven QC appeared for the father; a solicitor from the mother's former solicitors, Hughes Fowler Carruthers, appeared, with no instructions, on behalf of the mother. On the basis of the information provided (i.e. that the father, in whose favour a 'live with' order had been made, had returned to live in this country), I made a provisional declaration that the court could exercise jurisdiction. I queried why the matter had come into the Urgent Applications list, but was persuaded that the mother's previous conduct (I was advised about her recent conviction and incarceration following her conviction for the offence of bribery) had influenced the father and his legal team not to give the mother significant notice of his application. I suspended the contact order of DJ Gibson (i.e. for extensive staying contact between K and his mother), replacing it with a holding order that there be contact "as agreed between the parties and in England". Having been advised that the recent report of Ms King had been commissioned by the Russian Court, I allowed the father to adduce it into the *Children Act 1989* proceedings.

30. Prior to the return date of the father's *Children Act 1989* application, the mother initiated these proceedings on 25 March 2020 under the *Child Abduction and Custody Act 1985*, and directions were given by Judd J on 26 March 2020.

The mother's case

31. The mother points to the father's strong connections with Russia: he is Russian through and through: he speaks Russian, not English; his current partner is (the

mother alleges) his Russian lawyer; he chose to divorce in Russia and to have a Russian post-nuptial agreement; he uses the Russian legal system when it suits him. The father had not lived in England prior to October 2019.

32. The mother accepts that prior to July 2018, K was habitually resident in England. She contends that, given his strong pre-existing connections with Russia, K became habitually resident in Russia as soon as he arrived back there in the summer of 2018, pursuant to the English Court order; she argues that he was certainly habitually resident in Russia in the summer of 2019, and that his removal or retention was in breach of her rights of custody, which she shared with the father.

33. The mother disputes that K's views about returning to Russia amount to an 'objection', and further argues that the "*Art 13* defences (sic.) are founded on the confected premise that [the father] will not return to Russia. There is no sensible reason not to return to the country which remains the centre of his business and family life."

34. The mother disputes that K would be placed at grave risk of physical or psychological harm or otherwise placed in an intolerable situation should K return to Russia; she points to the fact that the father took steps, after he had arrived in England, to keep open K's place at the school/Gymnasium in St Petersburg as evidence of a lingering intention to return. As recently as 24 January 2020, K was still a registered pupil there. Moreover, she has proposed a number of protective measures in the event that I decide that K should be returned to the Federation of Russia; she agrees not to remove K from the father's care, at least until the first on notice hearing in Russia at the Petrogradsky District Court in St Petersburg, or as agreed between the father and herself in the interim.

The father's case

35. It is the father's case that

    i) K was habitually resident in England as at July 2018;

    ii) During the period which K spent in Russia during the autumn of 2018 and the first six months of 2019 he did not lose his English habitual residence and did not acquire habitual residence in Russia. Thus, the removal/retention cannot be wrongful;

    iii) If K was habitually resident in Russia at the time of the removal/retention, the mother had no rights of custody and was not exercising rights of custody;

    iv) *Article 13(b)* is engaged, and K will be at grave risk of harm should he be returned to Russia. It is the father's position that he will not be able to return to Russia with K;

    v) In any event, K strongly objects to a return and that he is of an age where it is "appropriate to take account of [his] views" and that I should exercise my discretion in not returning K to Russia.

36. The father asserts that no protective measures could properly or adequately address any considerations that might arise pursuant to *Article 13* of the *1980 Hague Convention* in the present case, and certainly not those which are proposed by the applicant mother in her document dated 2 June 2020 (served on 3 June 2020), even if revised. The father maintains that he would not be able to return to Russia with K because of the mother's threats to have him imprisoned[7] and the false criminal complaints he says she continues to make against him.

37. The father underscores his arguments with the contention that the mother cannot be trusted; he points unsurprisingly (and legitimately, it seems to me) to her conviction in the Russian criminal court in 2018. He further refers to DJ Gibson's critical finding about the mother having misled the court, and her "calculated deceit" in 2018 (see [14] above). He raised questions about her candour with the Russian courts in relation to her appeal in 2019; although I make no finding about this, it is a point not entirely borne out by examination of the documents to which my attention was focused. Having regard to the issues which I am required to determine in these applications under the *1980 Hague Convention*, I am not much affected by these arguments. Had I been, I would surely have had to balance them with complaints which the mother makes, or could make, about the father's conduct, including but not limited to: the circumstances in which he effected the removal of K from Russia in July 2019 without any notification to the mother; the manner in which the father corresponded with the mother after their departure, declining to answer her questions about his or K's whereabouts[8]; K's withdrawal from his Russian school without notice to the mother, and the father's deception of the school/Gymnasium ([21]); his assertion to the London Prep school that he is the parent with "sole parental responsibility" for K, and his deliberately misleading and evasive text messages to the mother about K's whereabouts in the autumn of 2019 (see [20] and [22] above).

Where was K habitually resident in the summer of 2019?

38. Under the *1980 Hague Convention*, a removal or retention of a child is 'wrongful' (*Art 3*) if it is in breach of rights of custody under the law of the State where the child was habitually resident immediately before the removal or retention, and those rights were actually exercised or would have been but for the removal or retention. The habitual residence of a child is "the place which reflects some degree of integration by the child in a social and family environment" (*A v A (Children) (Habitual Residence)* [2013] UKSC 60, [2014] A.C. 1, [2014] 1 F.L.R. 111 at [54]). The integration need not be total and unambiguous; there needs to be demonstrated "some degree" of integration which can be measured, on the facts, by reference to a range of day-to-day features and experiences of the young person's life.

39. It is agreed, indeed there can be no doubt, that K was habitually resident in England up to the end of July 2018. He had lived in London for the preceding four years; his roots were firmly embedded here. The burden falls on the mother to demonstrate that K had lost that habitual residence and acquired a new habitual residence in Russia at some point between 29 July 2018 and 4 July 2019.

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[7] In that regard, the mother undertakes not to voluntarily pursue, or support, in any way, any future criminal proceedings against the respondent, for the alleged abduction of K, in the event that criminal proceedings are initiated by the Police in Russia. See below.

[8] I have in mind the exchange of text messages from 30 August 2019 onwards: see in particular [20] above.

40. In determining this issue, I am conscious to ensure that "the child is at the centre of the exercise when evaluating his or her habitual residence" (per Hayden J in *Re B (A Child)(Custody Rights: Habitual residence)* [2016] EWHC 2174 (Fam) at [18]), and I adopt Hayden J's approach to this question:

> "This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc and an appreciation of which adults are most important to the child. The approach must always be child driven."

41. The mother's case is that it is likely that K's habitual residence transferred to Russia almost immediately on arrival on 29 July 2018 (or, following his holiday in France, in late August 2018), and certainly by the time that he started school in early September 2018, particularly given the basis on which his move to Russia was specifically approved by the English court. She asserts that Russia was to be, and did indeed become, the centre of K's life; he lived there, and he attended school there. She maintains that the fact that he was apparently unsettled in school in Russia in the autumn of 2018 is not at all surprising given the recent upheavals in his life, and is not indicative that he had not settled in Russia. As a secondary position, she argues that even if the acquisition of habitual residence was not as immediate as claimed, by the summer of 2019, K had acquired a sufficient degree of integration in Russia (given his school, his home, the presence of extended family) to support a finding that he was habitually resident there.

42. The father maintains that he sought permission to take K to live in Russia merely because he had no continuing entitlement to remain living in England at that time, having been previously dependent on the mother's 'Tier 1 investor' status for such entitlement. He further maintains that K never settled in Russia, and therefore never lost his habitual residence in England. Mr Turner QC contends that the only credible reason why the father would return to this country in the summer of 2019 was because K was not settling in Russia; he invites me to reject the mother's case that they fled Russia to frustrate efforts which the mother may make to have contact with the children.

43. In the first place, while cognisant that an older or adolescent child may develop a state of mind which informs their habitual residence (yielding an answer on the issue which may be different from that of the parent with whom they are living: *Re LC* [2014] AC 1038), it is nonetheless the case that:

> "…[w]here a child of any age goes lawfully to reside with a parent in a state in which that parent is habitually resident, it will no doubt be highly unusual for that child not to acquire habitual residence there too." (Lord Wilson in *Re LC* at [37])

For present purposes, I do not treat K as an 'older' or 'adolescent' child, like T in *Re LC*. I also consider it highly likely that up to and during 2019 the father was habitually resident in Russia.

44. In this case, K travelled back to Russia in 2018 pursuant to an order made by DJ Gibson granting his father leave to remove him; there is no doubt whatsoever that this was to be a permanent move. As DJ Gibson found only days before their departure in 2018 "These are Russian children ... Russia is their home country by both birth and early upbringing"; it was, in her view, where their ethnic and cultural needs would be best met (see [12] above). I have little objective evidence about K's life in Russia. I know that he resided in his father's sizeable dacha outside St Petersburg with his father, his father's partner, and his new-born half-brother. K attended school in the city. He was registered with a doctor and received medical treatment for medical problems. He was close to his extended family.

45. In retrospect, K speaks somewhat dismissively of his year in Russia; his father does too, remarking that K "did not settle or make friends". But the comments of both have to be treated with some caution, given their stance in these proceedings; in any event, a degree of adjustment and settling into his new environment was to be expected. It is material to my assessment of the respective merits of each party's case that even though the father claims that by December 2018 he was considering returning to England, because of K's apparent unhappiness, the father took no significant steps in that regard until after he had actually left the Russian Federation in July 2018. He exhibited to his witness statement the results of property searches undertaken in the spring (April/May) of 2019, which lent some weight to his case (though I note that the father has owned a property in London since 2007 while not living here, so purchasing property did not mean relocating here), and correspondence with an immigration solicitor ("[the father] would like to discuss his moving to the UK on invest visa basis. He used to have one, but it was cancelled in 2017 due to his divorce"), but this evidence was in my judgment counter-balanced by his e-mail to the London Prep School. This contact was not initiated until 30 July 2019, and is circumspect in its terms:

> "Now we are <u>considering the possibility to move back to London</u> as my older daughter studies there at [name of school] and [K] and I want to be closer to her. Therefore I wonder if [K] can be accepted at [London Prep School] from September or October 2019 and would be grateful if you kindly consider this possibility although I understand that it is a very short notice". (emphasis by underlining added).

46. Having reviewed the material available, I am satisfied that K had developed a sufficient degree of integration in life in Russia during the 10 months or so in which he lived there from the summer of 2018 to the summer of 2019 that he acquired habitual residence there.

Was the removal or retention in breach of the mother's rights of custody?

47. This question arises only if I conclude (as I have) that K was habitually resident in Russia at the time of his retention/removal. For the reasons which I discuss below, I confirm that the removal was indeed in breach of the mother's rights of custody.

48. In reaching this conclusion I turn first to the *1980 Hague Convention* itself, and the relevant domestic case law. *Article 5* of the *1980 Hague Convention* describes

'rights of custody' as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence". In many places in our domestic case law, judges have maintained that the meaning of the term is established by the 'autonomous' law of the Convention, that is to say its definition is not governed by differing national laws on the topic. It has been important to cling onto this principle having regard to the arguments paraded before me in this case.

49. Lord Donaldson's comments in *C v C (Abduction: Rights of Custody)* [1989] 1 FLR 403 at 412, [1989] 1 WLR 654, provide a useful touchstone for the correct approach of the court as follows:

> "I wish to emphasise the international character of this legislation. The whole purpose of such a code is to produce a situation in which the courts of all contracting states may be expected to interpret and apply it in similar ways, save insofar as the national legislatures have decreed otherwise. Subject then to exceptions…the definitions contained in the Convention should be applied and the words of the Convention, including the definitions, construed in the ordinary meaning of the words used and in disregard of any special meaning which might attach to them in the context of legislation not having this international character."

50. Baroness Hale in *Re D (A Child)* [2007] 1 AC 619 exhorted a similarly uniform approach to the interpretation of the Convention:

> "In the absence of a supranational body to define and refine these autonomous terms, member states must strive for consistent practice – not in the content of their domestic laws but in the effect that they give to the particular features of one another's laws" [28].

And she herself cited (at [45]) the comments of Lord Steyn, in the context of the Refugee Convention, in *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 517:

> "In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning".

51. So just as English concepts and English law rules about the meaning of terms in the Convention can have limited direct relevance to the interpretation of the Convention, nor should I be swayed by Russian concepts and Russian law rules about the meaning of the terms.

52. In addressing this issue on behalf of the mother, Mr Harrison urged consideration of *In Re F (A Minor)(Abduction: Custody Rights Abroad)* [1995] 3 WLR 339, [1995] Fam 224 wherein Butler Sloss LJ said:

> "It is the duty of the court to construe the Convention in a purposive way and to make the Convention work. It is repugnant to the philosophy of the Convention for one parent unilaterally, secretly and with full knowledge that it is against the wishes of the other parent who possesses "rights of custody," to remove the child from the jurisdiction of the child's habitual residence. "Rights of custody" within the convention are broader than an order of the court and parents have rights in respect of their children without the need to have them declared by the court or defined by court order. These rights under the Convention have been liberally interpreted in English law." (emphasis by underlining added).

53. Both Counsel focused in their submissions on a key passage from the speech of Baroness Hale in *Re D (A Child)* [2007] (citation above) which I set out below in full:

> "The question is, do the rights possessed under the law of the home country by the parent who does not have the day to day care of the child amount to rights of custody or do they not? States' laws differ widely in how they look upon parental rights. They may regard the whole bundle of rights and responsibilities which the law attributes to parents as a cake which can be sliced up between the parents: one parent having the custody slice, with the package of rights which that entails, and the other having the access slice, with the different package of rights which that entails. This is by no means an unusual way of looking at the matter. Alternatively, the state may regard the whole bundle of parental rights and responsibilities as inhering, and continuing to inhere, in both parents save to the extent that they are removed or qualified by the necessary effect of a court order or an enforceable agreement between them" [26].

54. Given the arguments ranged on this issue, it is relevant for me to quote further Baroness Hale's comments about 'rights of custody', rights of veto and *potential* rights of veto. In this regard, she said this:

> "… in common with the understanding of the English and Scottish courts hitherto, and with what appears to be the majority of the common law world, I would hold that a right of veto does amount to "rights of custody" within the meaning of *Article 5(a)*. I see no good reason to distinguish the court's right of veto, which was recognised as "rights of custody" by this House in *In re H (A Minor) (Abduction: Rights of Custody)* [2000] 2 AC 291, from a parental right of veto, whether the latter arises by court order, agreement or operation of law" [37];

And then:

> "I would not, however, go so far as to say that a parent's potential right of veto could amount to "rights of custody". In other words, if all that the other parent has is the right to go to court and ask for an order about some aspect of the child's upbringing, including relocation abroad, this should not amount to "rights of custody"" [38].

55. Following these broad statements of approach, I determine the relevant 'rights of custody' in play here, by asking two questions:

    i) What was the mother's legal position created by the law of Russia (the state in which the child was habitually resident) immediately before the removal or retention?

    ii) Does the position created by the law of Russia equate to 'rights of custody' for the person in question having regard to the meaning of the term 'rights of custody' as established by the autonomous law of the *1980 Hague Convention*?

56. In answering those questions, I have been assisted by altogether three sources of expert opinion on the issue of the mother's 'rights of custody' in Russia, and specifically whether the father's actions amounted to a breach of the mother's rights of custody. In understanding these opinions, I was taken to various articles of the Russian Family Code, which regulate relations between parents and children (i.e. family relations) in the Russian Federation. They included the following:

    i) *Article 61 of the Family Code*. Equality of rights and obligations of parents. Parents have equal rights and bear equal responsibilities in respect of their children (parental rights).

    ii) *Article 65 of the Family Code*. Exercise of parental rights. (1)…. (2) The parents decide on all matters relating to the upbringing and education of their children by mutual consent, giving due consideration to the child's interests and opinion. If there are disagreements between the parents, the parents (one of them) have the right to apply to the Child Protection Services or the court for resolution of such disagreements. (3). Place of residence of children in case of separation of parents is established by agreement of parents. If there is no agreement between the parents, the dispute between the parents shall be settled by the court giving due consideration to the child's interests and opinion…

    iii) *Article 66 of the Family Code*. Exercise of parental rights by a parent living separately from the child. The parent living separately from the child has the right to communicate with the child, participate in his/her upbringing and solution of the issues of receiving education.

57. As to the opinions themselves, first, at the request of the mother's solicitors the English Central Authority obtained advice from the Russian Central Authority on this issue. On 21 May 2020, Ms Markelova on behalf of the Russian Central Authority replied, opining:

> "According to the Russian family legislation the only way to restrict custody rights ("parental responsibility" in the Russian Family Code) or deprive of custody rights is a court decision. If there is no such a court decision, both parents have joint custody rights without any exceptions. Even when one of the parents is imprisoned, it does not mean that he/she is automatically restricted or deprived of custody rights…. If the minor has both parents and one of them is imprisoned, the custody rights of the imprisoned parent still exit [sic. 'exist'] (as the right to make an exit ban)."

58. In many cases brought under the *1980 Hague Convention*, it may reasonably be assumed that the Convention requirements are indeed satisfied as a matter of law, given that the Central Authority of the requesting State (in this instance Russia) will have scrutinised the application under the *1980 Hague Convention*, at least to some degree, before it is conveyed to the Central Authority of the requested State (England). Indeed, the Hague Conference on Private International Law has published a Guide to Good Practice in respect of the *1980 Hague Convention* (Part 1 covers Central Authority practice) which exhorts Central Authorities to "carefully scrutinise outgoing applications to ensure they come within the Convention."[9] In many cases, one may not need to go further than the legal opinion of the Central Authority of the requesting state; Ms Markelova's advice may therefore be said to be persuasive.

59. Secondly, Ms Suykiyaynen, the Single Joint Expert ('SJE') appointed pursuant to a direction I gave at the Pre-Trial Review, opined (2 June 2020) that at the material time both parents had "equal rights" of custody:

> "[9] …even where parents are living separately and apart, Article 65 of the Family Code prescribes that all questions of the child's upbringing, education and protection shall be decided by mutual agreement. If the parents fail to reach an agreement, they may apply to a court or competent youth authority.
>
> [11] Under the Russian law such decisions neither grant "living with" parent more rights than "living apart" parent nor can change "parental rights belong to both parents" rule. That means that (i) a parent who has the benefit of a court order providing that a named child "live with" that parent has the same parental rights ("rights of custody") as another parent, and therefore (ii) and all rules of the child's location by not withstanding that "the child shall live with" court order has been made.
>
> [16] Under the Russian migration regulations, the child might be removed from Russia by one of the parents ("living with" or "living apart"). No "the child shall live with" court order can change this rule… If the parent does

[9] See on this point Moylan LJ in *Re S (A Child)(Abduction: Dismissal of Application)* [2018] EWCA Civ 1453 at [30-33].

> not want the child to leave the country, he/she should declare it by filing an application to ban the child from leaving Russia…
>
> [17] … Imposed travel ban just prevents crossing the state border, and lack of such a plan cannot be interpreted as a silent consent. … from the Russian legal perspective, the sole fact that the mother's application for travel ban imposing (sic.) has been granted proves that she had a full range of parental rights ('rights of custody' in the meaning of Article 3 of the 1980 Hague Convention).
>
> [20] The parental rights of [M] have been neither restricted nor divested, she had the rights of custody in the meaning of the Art.3 of the [Convention] and a full range of parental rights in the meaning of Article 61, 63, 64... Therefore, her rights were equal to [F]'s rights."

60. Thirdly, in a report dated 8 June 20120 filed with leave which I gave at the outset of the hearing (see [117]-[128] below), Ms Galina Pavlova, in her commentary on the report of the SJE, and after a lengthy discussion of the relevant article of the Family Code observed as follows:

> "Parents have equal rights and responsibilities in respect of their children, subject to *Article 61*, paragraph 1, of the Family Code. They have the right and duty to bring up their children and care for their health and physical, mental, spiritual, and moral development (*Article 63*, paragraph l, of the Family Code).
>
> The analysis of case law allows to conclude that in Russia, generally speaking, parents are not held criminally liable when withdrawing[10] a child.
>
> … the law does not prohibit the transfer of a parent with whom a child lives by court decision to another place, without the consent of the other parent. The other parent has a mechanism to protect his rights…a parent who does not live with the child *has the right to submit an application in advance that prevents the child from moving abroad of the Russian Federation (Article 2l of the Law "On the procedure for leaving the Russian Federation and entering the Russian Federation").* Despite the fact that this norm is not applicable to civil legislation, it, along with the existing set of norms, *allows parents to protect and exercise their rights with respect to the child*... at the time of departure (crossing the border of Russia) there was no prohibition to move the child based on the mother's application.

[10] i.e. removing a child from one country to another

> Therefore, the father was allowed to move to a new residence with the child….
>
> The mentioned above norms of current Russian Law does not establish an obligatory procedure of getting the other parent's consent on moving the child both inside the Russian Federation and abroad. This applies to both parents, whether the child lives with it on a permanent basis or not." (italics added for emphasis, underlining in the original).

61. On the second day of the hearing, the SJE, Ms Suykiyaynen, provided a reply to the report of Ms Pavlova as follows:

> "… the *Hague 1980 Convention* is … part of Russian law … the return of children abducted from Russia is to be made in accordance with the rules applicable in jurisdiction to which the child was removed from Russia. But these are just procedural rules. The grounds for return (substantive rules) are provided for by the *Hague 1980 Convention* itself.
>
> According to the migration rules, a child can leave Russia with any of the parents… But this does not mean that the mere child's departure from the country without problems on the border proves that there were no violations of the *Hague 1980 Convention*."

62. The mother's case is that the legal opinion is clear: she had rights of custody at the material time. In Russia she was endowed with "the whole bundle of parental rights and responsibilities"; this was not a case in which the mother's rights represented merely a 'slice' of the 'cake' (see *Re D*) above ([53]). The father's case is that under Russian law, the existence of the "live with" order in his sole favour (granted at the Central Family Court by DJ Gibson in 2018) meant that he was entitled to have the child "live with" him in any country he chose unless and until positively restrained; and that he did not require the consent of the mother or permission from the court for an international move of the child. He further contends that the mother possessed only a 'potential' right of veto, which, he says (relying on Baroness Hale's comments at [38] of *Re D,* cited above at [54]) does not amount to 'rights of custody'.

63. I accept Mr Harrison's formulation, and reject both of Mr Turner's arguments. I consider that Mr Turner has treated the mother's right to apply for a migration/travel ban, the equivalent of a 'port alert' order (which of course she exercised in January 2020), as the limit of her 'rights'. But *Articles 61*, *65* and *66* of the *Russian Family Code* particularly when taken in combination, make clear that the mother's rights are far greater. After all, Ms Pavlova, on whose opinion Mr Turner particularly relies, describes the parent's right to apply for a 'travel ban' as one which "allows parents to protect and exercise *their rights*" (see [60] above) (emphasis added). Ms Suykiyaynen concurs that as a matter of migration law *both* parents had the right to remove K without a court order.

64. Further, and in any event, *Art. 16(3)* of the *1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental*

Responsibility and Measures for the Protection of Children provides that the mother's parental responsibility for K under English law transferred to Russia when K relocated in July 2018:

> "Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State." (*Art.16(3)*).

65. Drawing this material together, I find as follows:

i) *Article 66* of the Russian Family Code (discussed in [56] above) is clear that the mother (as the parent living separately from the child) has the right to participate in K's upbringing and solution of the issues of receiving education;

ii) The unilateral removal of K did not break any migration law, as at the time of the father's departure, the mother had not applied for a travel ban;

iii) Domestic definitions of custody rights are not necessarily the equivalent of the concept of 'rights of custody' created by *Article 5(a)*; it is wrong to impose "parochial domestic notions of custody on the Convention concept, effectively undermining the goals and objectives of the Convention"[11]; insofar as Mr Turner sought to argue a narrow interpretation or application of the mother's custody rights in Russia, this was a flawed approach;

iv) I am satisfied on the evidence of Ms Markelova and Ms Suykiyaynen (whose combined evidence, where it differs, I prefer to that of Ms Pavlova) that the mother enjoyed "the full bundle of parental rights and responsibilities" (per *Re D*) in respect of K in Russia; I am further satisfied that at the material time, these had not been removed or qualified by the effect of any court order (or indeed by the mother's incarceration) in 2019. Even on Ms Pavlova's opinion, the mother had a 'right of veto' which would amount to a relevant 'right of custody';

v) In my judgment, Ms Pavlova has elided the different concepts of migration (criminal) law and family law; this is at least in part illustrated by her comment that the *1980 Hague Convention* operates in *incoming* cases in Russia but not for *outgoing* cases[12]; that cannot be right, and in this regard she is confusing the procedural law with the substantive. This point is picked up by Ms Suykiyaynen in her reply (see [61] above). Ms Pavlova has, in my judgment, focused on the criminal law in forming her opinion; so while it is accepted that the father did not commit a migration violation or criminal offence by removing K from Russia, this is not the same as saying that he did not breach the mother's rights of custody. Had there been a travel ban in place, the father would have breached the criminal/migration law too. It would make a nonsense of the *1980 Hague Convention* if it only operated to protect the parent's 'rights of custody' where a travel ban was in place;

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[11] Professor Silberman, cited in *Re D* [2007] 1 AC 619 at [15]

[12] "… international legal norms are applied in cases of illegal transfer of a child to the Russian Federation, but not from the Russian Federation".

vi) Further, and separately, the mother's rights of custody (her parental responsibility) were protected by virtue of *Article 16(3)* of the *1996 Hague Convention*;

66. As earlier indicated ([47] above), and for the reasons set out above, I have reached the clear conclusion that the removal of K from the jurisdiction of Russia, without the mother's knowledge or consent, breached the mother's rights of custody and/or prevented the mother from exercising her 'rights of custody'.

Article 13(b): grave risk of physical or psychological harm, or otherwise an intolerable situation.

67. The burden shifts to the father to demonstrate that this exception of "restricted application"[13] applies, and to produce evidence to substantiate the same; here he seeks to demonstrate on the balance of probabilities that "there is a grave risk that [K]'s return would expose [him] to physical or psychological harm or otherwise place [K] in an intolerable situation". This exception to the general obligation under *Art 12* is designed to legislate for a very limited number of cases. The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'; intolerable "is a strong word"[14] – it should be "a situation which this particular child in these particular circumstances should not be expected to tolerate." If this is established, then I may consider whether, in the exercise of my discretion, I should order K's return.

68. The threshold for proving an exception under *Article 13(b)* of the *1980 Hague Convention* remains high notwithstanding the removal of judicial gloss on the words of the exception by the Supreme Court in the cases of *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144 and *In re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10; [2012] 2 AC 257 .

69. It is to be noted that (*In re E*, at [33]):

> "Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm."

It is also the case (*In re E* at [35]) that I must consider:

> "… the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends

[13] *Re E (Children)(Abduction: Custody Appeal*) [2012] 1 AC 144 at [31]
[14] *Re D (Abduction: Rights of Custody)* [2007] 1 Ac 619 at [52] Baroness Hale.

> crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home".

70. Lord Donaldson MR in *C v C (Abduction: Rights of Custody)* [1989][15] (cited in *AT v SS*) adds this further aid to the application of this exception:

> "… in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words 'or otherwise place the child in an intolerable situation' which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the State to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, i.e. the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country… can resume their normal role in relation to the child."

71. It should be noted that in *AT v SS (Abduction: Art 13(b): Separation from carer)* [2016] 2 FLR 1102 MacDonald J observed ([33]), and I agree, that whether the separation of a child from his or her primary carer satisfies the imperatives of *Article 13(b)* will depend on the particular facts in each case; in that case, even the prospect that child would probably be placed temporarily in foster care in the requesting country was not sufficient to justify the exception. I cite here MacDonald J's summary to illustrate and highlight that point:

> "As regards a return to a placement in care in the requesting State, where the requesting State has adequate procedures for protecting the child, and accepting that each case must turn on its own facts, it is unlikely that a parent will be able to successfully oppose a return on the basis that the child is being returned into temporary public care pending the courts making a substantive welfare determination (see *Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930 and *Re S (Abduction: Return to Care)* [1999] 1 FLR 843). Once again however, each case will turn on its own facts." (at [34])

72. Macdonald J in *AT v SS*, having reviewed the authorities, said this at [47]:

> "… accepting the imperative need to maintain fidelity to the aims of the Convention, it is important in cases where a

[15] For citation, see [49] above.

> parent refuses to return that, in determining whether a defence under Art 13(b) is made out, the primary focus of the court remains on the question of the risk of harm or intolerability to the child rather than the conduct of the abducting parent. Within this context, it is important again to bear in mind that Art 13(b) looks to the situation as it would be if the child were returned forthwith to his or her home country and that the situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. The significance for the situation the child will face upon return of a parent's refusal to return must in each case be evaluated in the context of the protective measures that can be put in place to mitigate the impact of the same".

73. Mr Turner argues that the father cannot return to his homeland, Russia, for fear of finding himself at the mercy of the mother's conduct in her "continued efforts to have [him] imprisoned"; he maintains that the mother has been shown to be prepared to mislead courts in many and various ways (see [37] above), she has already been convicted of attempting to bribe a person in authority to institute proceedings against the father. The mother accepts that she has lodged one complaint with the police following an occasion in November 2019 when she was assaulted, she believes at the father's behest. Mr Turner throws other issues into the mix too, including: the change of schooling for K, the separation of K from his sister; the difficult relationship between K and his mother; the inadequacy of the accommodation of the maternal grandparents and their ill-health.

74. Mr Harrison submits that:

i) The father himself has acknowledged that the Russian police have decided "not to take any further action" in respect of the mother's criminal complaints; the father himself repeats more than once in his statement that "those complaints have been investigated but not pursued". In any event, protective measures are offered (and counter-offered) which include undertakings from the mother not to pursue, or support, in any way, any future criminal proceedings against the father, for the alleged abduction of K, in the event that criminal proceedings are initiated by the Police in Russia; the mother is already subject to a suspended or paused sentence of imprisonment, so, it is submitted, she is hardly likely to seek to abuse the power of the authorities in the future;

ii) The mother's offer of protective measures goes further; she has suggested that if the father does not return with K, she will not care for K and *if required* will arrange for K to be cared for by her own parents and will provide a nanny to assist them;

iii) The father's apparent reluctance to travel back to Russia is confected. He is posturing. He has businesses, homes, and at least one younger child in Russia. If I decide that K should return the reality is that the father will accompany him. The father is a loving father who will not abandon his son. Moreover, he

has a large home, businesses, an extended family, and multiple social and business contacts in Russia;

iv) The father has the benefit of a *section 8 Children Act 1989* 'lives with' order which will be recognised under the *1996 Hague Convention*; the Russian court has already refused the mother's application for an interim order; there is no risk of K being summarily removed from the father under Russian court order;

v) It is quite apparent that the father fully contemplated the possibility of returning to Russia in 2019; he kept K's place at the Russian school open for a period of time, which is inconsistent with a case based on 'intolerability' now;

vi) That K and L will be separated if K returns to Russia is not a strong point; DJ Gibson made welfare determinations in 2018 predicated on the basis that K would be living in Russia while L was educated in England; even though the father now maintains that "[K] was upset that he could not come to London for [L]'s exeat weekends," this hardly creates an intolerable situation; the siblings are seven years apart in age "and have completely different interests" (according to the mother);

vii) The Russian court is seised of the proceedings, and is patently not dealing with the father unfairly; the court has already rejected the mother's case for interim residence of K;

viii) The options for K are reasonable if the father does not return with K: (i) he could go to live with his maternal grandmother with whom he was close and was said to have a loving relationship; (ii) he could live in his father's dacha with his paternal relatives; or (iii) he could live with his mother. As to (iii) even though K has not seen his mother for some time, she was his primary carer until April 2018, and in spite of her conduct, DJ Gibson had nonetheless ordered that she and K should have extensive contact.

75. In relation to the *Article 13(b)* issues, Ms Demery was of the view that K would not be placed in an intolerable situation in the event that he returned to Russia provided he was not placed straight into the care of his mother. She reported:

> "[K] requires safe, committed and responsive parenting. From [K]'s description, his mother did not provide this and past assessments indicate the same. It will be for the court to assess whether a return to Russia would constitute a grave risk of harm to him or whether robust undertakings could the protection he requires. However, given that [K] has not seen his mother for over two years, the instability he has experienced in his care arrangements and his expressed views about his mother, it would be difficult for him to move directly to his mother's care if this court orders his return. <u>It would be advisable that he initially stayed with another family member while a welfare assessment of him and his mother is undertaken</u>." (emphasis by underlining added).

76. In considering whether a return would be intolerable or psychologically harmful for *this* boy in *these* circumstances, I must examine two possible scenarios: (i) where the father does accompany K back to Russia, and (ii) where he does not.

77. As to the first (the father does accompany K back to Russia), I am satisfied that, with the protective measures proposed by the mother (and counter-proposed by father) in place, the father *can* if he wishes return safely with K to Russia; as a parent who I know cares very deeply for K, I am sure that he will do all he can to accompany his son. I accept Mr. Harrison's points at [74](i) and (ii) (above).

78. As to the second (the father does not accompany K back to Russia), I am wholly satisfied on all of the evidence that K will be adequately provided for in Russia. As Ms Demery has reported, K is actually quite used to being looked after by nannies and household staff, even in the last two years when he has been in the care of his father. I am confident that the father will make proper arrangements for K to receive appropriate care in his dacha outside St Petersburg; the father deposes to the fact that the paternal grandmother looked after K many times during 2019 when the father was travelling; alternatively, K may be able to stay with his maternal grandmother with whom he is close, and the mother has offered to provide a nanny. The mother, importantly, does not seek to impose herself on K by having contact with him, nor does she seek his immediate care. It is likely that there will be schooling available for K; as mentioned above, I note that the father had taken steps to preserve K's place at the Gymnasium in St Petersburg, perhaps not a step he would have taken if he had thought that K's return would cause him grave psychological harm.

79. I accept that it would not be K's choice to be returning to Russia, and I accept that he will be upset to be leaving England, the school which he attended for most of the last academic year (though the last three months will hardly have promoted his integration into the school), but that does not render his return 'intolerable'. I look at his views in the next section. Having regard to all the matters set out above, I do not believe that K will be likely to suffer the "severe degree of psychological harm which the *1980 Hague Convention* has in mind" (per Lord Donaldson) and the father therefore fails in his case under *Article 13(b)*.

K's views: do they amount to an objection?

80. I must next consider whether K "objects to being returned" to Russia and "has attained an age and degree of maturity at which it is appropriate to take account of [his] views" (*Article 13*).

81. In considering this issue, I have of course followed the approach clearly set out by Black LJ (as she then was) in *Re M & others (Children)((Abduction: Child's Objections)* [2015] EWCA Civ 26, [2016] Fam 1:

> "… the child's views have to amount to <u>objections</u> before they can give rise to an *Article 13* exception. This is what the plain words of the Convention say. Anything less than an objection will therefore not do." [38] (word underlined for emphasis)

In her judgment, Black LJ considered the jurisprudence on the use of the word 'preference' in contra-distinction to 'objection', including the decisions of *In re R (A Minor: Abduction)* [1992] 1FLR 105, 107-108 (Bracewell J); *In re S* [1993] Fam 242, 250 (Balcombe LJ); and *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038 (Lord Wilson at [8] and [17]). Black LJ did not appear to disapprove of the use of the word 'preference' when discussing shades of view relevant to this Convention exception, and accepted that it was:

> "… one way of summarising that, for reasons which will differ from case to case, the child's views fall short of an objection" [41].

And later, having reviewed the authorities on the status of the child's views at the gateway stage and at the discretion stage, concluded this, at [69]:

> "… the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. Sub-tests and technicality of all sorts should be avoided".

At [77] she added:

> "I discourage an over-prescriptive or over-intellectualised approach to what, if it is to work with proper despatch, has got to be a straightforward and robust process".

82. In an earlier judgment *In re F (A Child) (Abduction: Acquiescence: Child's Objections)* [2015] EWCA Civ 1022, Black LJ had said this, at para 35, which I consider adds useful additional context:

> "It is not necessary to establish that the child has 'a wholesale objection' to returning to the country of habitual residence and 'cannot think of anything positive to say about that other country'. The exception is established if the judge concludes, simply, that the child objects to returning to the country of habitual residence … Whether a child objects is a question of fact, and the word 'objects' is sufficient on its own to convey to a judge hearing a Hague Convention case what has to be established; further definition may be more likely to mislead or to generate debate than to assist."

83. I remind myself when looking at K's views that the Convention exception is only engaged if his objection is an objection to return to *Russia*, "rather than to returning to particular circumstances in that country, although it has been clear from early on that there may be difficulty in separating out the two sorts of objection" (Black LJ at [42]). The difficulty arises in applying this exception, as here, where it appears that the child conflates the prospect of returning to a country, with the prospect of returning to the care of the other parent, particularly where the child holds particularly antipathetic

views about the other parent. It is notable that, when asked by Ms Demery about Russia and England, in his responses K closely linked his views about the country and the home location of his two parents (see [86](ii)/(v) and [87] below). A further difficulty arises, in circumstances which may pertain here, where the child knows or is likely to be aware that the 'abducting parent' is professing an intention not to return with the child: "It would be artificial to dissociate the country from the carer in the latter case and to refuse to listen to the child on so technical a ground" (Butler Sloss LJ in *In re M (A Minor) (Child Abduction)* [1994] 1FLR 390, at 395)

84. On 29 April 2020, K had a discussion, specifically for the purposes of these proceedings, with Ms Kay Demery, Family Court Adviser from the Cafcass High Court Team. She had interviewed K remotely using WhatsApp video-call; she felt that he engaged "effectively" with the process. She has filed a report dated 6 May 2020.

85. As to K's age and maturity, Ms Demery observed as follows:

> "At almost nine, [K] is poised for major transition as he stands on the cusp of adolescence. Children of his age are becoming much more independent and able to handle certain responsibilities with minimal adult supervision. He was able to engage in a lengthy discussion with me, in challenging circumstances and was able to maintain a good level of communication, which demonstrated a degree of maturity. I would therefore assess [K]'s maturity to be commensurate with his chronological age and as such he is approaching an age when his views will carry some weight but are not determinative".

86. Turning to K's views, I lift the following key points from her report:

i) Russian remains K's first language, although he is fluent in English;

ii) That K knows that his mother lives in Russia, but he "does not want to see her". "He said that he does not like his mother then said "I do like her, but she is very mean. She doesn't give me food. I don't remember what she looks like". He said he has no photographs of her". He said that "he did not want to speak" to his mother … "he does not want her to record him"; "he could remember something very bad about his mother… he was taking pictures of his dad and she told him off. He thought this happened in the zoo and in a circus"; "I don't want to go back <u>there</u>. <u>She</u> is mean" (emphasis by underlining added); Ms Demery added "He said that he hangs up when she calls him as all she says is, "I love you, I love you a billion times. That is only thing she says.""";

iii) "In discussing Russia, [K] said that he did not like living there. He was in Year 1 at school and it was 'pretty boring'. He had to write everything perfectly. He said, "I decided to leave". If he went back to Russia, he would have to start the school year again and he would be bored";

iv) He "misses his maternal grandmother the most", and he cannot remember when he last saw her, but it was a long time ago; he does not speak with her "there is a poor connection, adding that his father does not have her number". He described her as "a good member of our family". He would not want to go to Russia to see her; he said he does not want to speak to her, because "[K] said that his mother would know he was there. He said she would know because she paid £10,000 for his father to go to prison. I asked how he knew this, and he said he read it on the internet. He added that he was very shocked." He also recalled his paternal grandparents in Russia "whom he likes";

v) That, in relation to returning to Russia, K told her: "that he does not really like Russia. The fun parks and circuses are OK. He again returned to the statement he made earlier that his mother would know if he were in Russia. He said that neither his father nor his sister wants to see his mother either. He told me that his mother tortured his sister. I asked what he meant. He said that she was very mean to her."

vi) "…his father was kind and he spent a lot of money on a tent for their garden";

vii) "He is aware that his father would not return to Russia with him. Irrespective of this, he does not want to return".

viii) In a message for me, K said: "Dear Judge, I just want to live with my dad in London. I don't want to see my mum."

87. Ms Demery concluded with the following opinions drawn from her investigation:

> "[K] has expressed a strong wish to remain in the United Kingdom with his father. He has nothing positive to say about his life in Russia, or sadly and more importantly about his mother. He seems to view his mother as all powerful who would know if he visited Russia".

Adding materially

> "It [is] apparent that his father has inappropriately shared adult information with [K] and this may have influenced his views about his mother."

And

> "It is concerning that [K] has been exposed to the parental conflict in such a way that post separation he has been unable to have a positive relationship with the parent with whom he is not living. I found it surprising that after living with his mother for the first six years of his life, as his primary care giver, he could not find anything positive to say about her. [K] is also being raised in a home where both his father and his sister hold negative views about [the mother] and where there is no counterbalance".

88. Having regard to these matters, my conclusion is:

i) That K "has attained an age and degree of maturity at which it is appropriate to take account of [his] views"; this was in fact conceded by the mother;

ii) That K would clearly like to remain living with his father; he does not want to live with his mother, or indeed even see her; were *that* the issue for consideration, which it isn't, I would say that his view on that issue would certainly amount to an 'objection';

iii) When interviewed in April 2020, he was enjoying living in England;

iv) I do not accept Ms Demery's assessment that K "… has nothing positive to say about his life in Russia", as he was able to reflect on some positive relationships which he enjoys with extended family members there. He nonetheless told Ms Demery that irrespective of his father's position, "he does not want to return" to Russia (see [86](vii) above). This is accompanied by some generally negative views about his previous life, and schooling in Russia;

v) Taking that last statement as a 'straightforward'[16] expression of view, in the context of his earlier comment (viz. "I don't want to go back there" ([86](ii)) I am satisfied that K has articulated an 'objection' to a return to Russia, a view of which it would be appropriate for me to take account when reaching a decision on this application.

89. I return to examine K's views further when I discuss the exercise of my discretion.

Discretion

90. K's 'objection' to returning to Russia (see [88](v) above) opens the gateway to the exercise of my discretion as to whether I should order K's return to Russia. K's views are not determinative at this discretionary stage; on the contrary, they are to be 'taken account of' in a wider assessment of welfare issues which are 'at large' (*In re M* [2008] AC 1288). In this regard, I follow the guidance of Baroness Hale at [43] (ibid.):

> "… in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare".

It is both convenient, and important, that I should reproduce here what Baroness Hale went on to say at [46]:

[16] See [81] above: "the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned…".

> "In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances".

91. I start with the objection itself and remind myself that I must consider K's views as they are expressed now. In trying to divine those views, I have sought colour and context from earlier discussions which K has had with professionals; both counsel have indeed encouraged this approach by quoting from the earlier reports of Ms King, the independent social worker. The report from Ms King prepared in April 2018 reveals that at that time, K thought it would be "nice" to live close to his extended family in Russia; he spoke of liking his paternal aunt "a lot"; he identified with his Russian heritage, and spoke fondly of his maternal grandmother (K described her to Ms King as "the world's greatest baker") and paternal extended family. At that stage he was said to be "confused" about where he wanted to live.

92. Recognising that much happened over the next 20 months, it was material to see what K said when he was interviewed again by Ms King in February 2020. At that time, Ms King reports that:

i) "[K] wasn't really happy" in his school in Russia "because he just learnt letters; he said that he made friends"; he "felt good about moving to the UK";

ii) K wants "to stay with his father because he knows that he cares about him and looks after him … he has a nice and happy life with his father… he wants to live with his father in England because he cares about him… although he was living in Russia for a short time, he feels happier to be back in England now". It was said that he is happy at his current school in London and likes his friends;

iii) K did not want to see his mother "because she was in prison";

iv) On her assessment, K (like his sister) is "very clear" that does not want to live in Russia nor to live with their mother.

Mr Turner emphasised Ms King's conclusion at sub-para.(iv) above. I am satisfied that Ms King has faithfully reported ***L's*** clear view that she does not want to live in *Russia* "as it presents the opposite of her political beliefs… [and] feels very frightened to go anywhere close to Russia because of what her mother is capable of doing". However, on the same analysis of the report, I find no reference to ***K*** having expressed a similar view, let alone 'clearly'. The closest one comes to his view on living in, or returning to, Russia in this report are the comments which I have summarised in (ii) above.

93. This assessment prepared three months before the Cafcass assessment, but when read together, materially informs my evaluation of the strength and depth of K's objection. K's 'objection' appears to be rooted

i) in part in his antipathy towards his school/Gymnasium which he regarded as 'boring' (per Cafcass: "[i]f he went back to Russia, he would have to start the school year again and he would be bored"),

and

ii) in part in his fear that this will bring him into direct contact with his mother.

In neither report is his antipathy towards Russia particularly powerfully or cogently expressed, and I do not regard his objection to return as anything like adamant; frankly, it is not in my judgment a strong objection.

94. My assessment of the objection is inevitably informed by Ms Demery's view that over the last two years or so the father has inappropriately shared adult information with K; I must have regard to the real possibility (as Ms Demery suggests) that this has influenced K in his views about his mother[17]. The 'adult sharing of information' is, in my judgment, the likely explanation for K's volunteering to Ms Demery of misleading information on a number of topics: his half-siblings; his denial that his father has a girlfriend (notwithstanding that the school refers to her); his description of St. Kitts and Nevis as his "motherland", whereas the family have limited links with the country, and he had only visited it twice. There is reason here to conclude that K's views, or some of them, are not entirely authentically his own.

95. K's views are one of the factors to be considered at this discretionary stage, and my comments in the preceding paragraphs give a degree of perspective to the finding that he 'objects' to a return to Russia. Although satisfied (see [88](v)) that K 'objects' to returning to Russia, I am not persuaded that his view is particularly solidly based (see [93] above). His responses to Ms Demery reveal his inability to separate out effectively his views about a country and his views about the parent with whom he associates the country: take for example "I don't want to go back there. She is mean" (see [86](ii) above) and "I just want to live with my dad in London. I don't want to see my mum" ([86](viii)).

[17] For example, K told Ms Demery that his mother had "asked his father for a million pounds and that she wanted all his father's money, or she said she would take away his children. His father told him this".

96. Nor, for the reasons set out below, do I consider that his views correspond with his own best interests.

97. First, I am extremely troubled that he has been unable to have a relationship with his mother at all in the last eleven months since her release from prison, and that he is not able to find anything positive to say about her. She was K's primary carer until 2018, and now has no relationship with him. Two years ago, DJ Gibson considered that, in spite of the mother's faults, K should spend half of each school holidays with her. This is an order which has not been implemented through changed circumstances, and as Mr Turner accepted, K is now 'alienated' from his mother. There is reason to conclude (as Ms Demery suggests) that the father has infected K's view of his mother by sharing adult information with K inappropriately. I accept Mr Harrison's submission that the prospects of repairing the relationship are poor while the mother and K are living in different countries. It cannot be repaired through telephone or Skype contact but will require them to experience regular face-to-face contact which is more likely to be achieved in Russia.

98. Secondly, I note that in discussion with Ms King, K was able to recognise the value of his relationships with Russian relatives who he does not see here; he confirmed to Ms Demery that "he misses the maternal grandmother the most", but that he does not speak with her as, he says implausibly, "his father does not have her number". Materially, he added that "she is nice and a good member of our family." Some of these comments chime with the earlier (2018) remarks reported in the first reports of Ms King (see [91] above). These wider family relationships are often of importance to a young person whose parents are locked in post-relationship hostility; at present K is denied ready access to these relationships.

99. Further while the English Court and the Russian Court are currently seised of welfare proceedings, the English Court is only provisionally so (see [29] above). By contrast, the Russian Court is well advanced in its welfare enquiry; it has rejected a challenge to its jurisdiction; it has received already two professional welfare reports, and the report of Ms King; it has commissioned a psychological assessment of the family. The father has long-standing and deep connections with Russia which is his natural home; he has lavish homes and successful businesses there; his wider family and the mother's wider family are there; although L is educated in England, K has no other family or extended family in England.

100. On the wider welfare plane, I recognise that K has spent a considerable amount of his childhood in England; he is fluent in English; he enjoys living in England and most importantly he wishes to remain living with his father who apparently wishes to remain living here. He is enjoying his current school, he has settled there and has friends here (though those named are all, I believe, children of Russian heritage). It is also right to point out that he has not yet completed a single full term at the school[18]. These considerations weigh heavy in the welfare balance too.

101. When I weigh the wider welfare considerations which I have outlined in [97] to [100] above, alongside K's objection, I reach the clear conclusion that it is in K's interests that he should be returned to Russia, where the fully-informed welfare-based

[18] He started mid-way through the autumn term in 2019 up to Christmas; the Easter term was interrupted by the CV-19 pandemic. Education in the summer term 2020 has been delivered remotely (see [21] Cafcass report).

decisions can be made in a court to which both his mother and father have sought access in the past, and to which they have ready access. They have resources to fund appropriate representation and they can litigate in their first language. Of no small significance in the reckoning is that an order for return would reflect the policy of the *1980 Hague Convention.*

Conclusion

102. At the PTR I encouraged the parties to engage in mediation in this case. They have not done so yet. It seemed to me that, highly conflictual though this case has become, there was at least a potential for an agreed resolution given that the outcome for which the parties contend now is the exact opposite of the one for which they contended in June 2018 (the mother then wanted the children to be in England, and the father wanted permanent leave to remove to Russia). Moreover, this family live a truly international life, and the children have developed connections to at least three countries. In addition to the properties in England and Russia, the father has a home in France where the children spend many holidays.

103. For the reasons set out above, I have reached the conclusion that the mother has made good her case for the return of K to the Federation of Russia under the terms of the *1980 Hague Convention*. I am satisfied that the father unlawfully removed K from Russia in July 2019, or unlawfully retained him in London in September 2019. In my judgment, nothing turns on whether this was a wrongful removal or retention, although it is likely that the decision not to return to Russia was germinating while the father was in France during the summer holidays of 2019, and became clearer when he contacted the London Prep school. The retention crystallised when the father accepted the school place in London. The "very limited exception"[19] to an order for return on the basis of 'grave risk of harm / intolerability' has not been made out, again for the reasons set out at [67] to [79] above. Although I was persuaded that K objects, for the reasons set out in [88] above, that was not of itself sufficient to cause me to exercise my discretion not to return (see [90]-[101]).

104. In the circumstances, it has not been necessary for me to consider whether the inherent jurisdiction could or should be deployed here.

105. This decision, to return K to the Federation of Russia under the terms of the *1980 Hague Convention* is, no more and no less, a decision to return him to the country where he was habitually resident before he was removed in breach of his mother's rights of custody. Once back in that country, the court there can decide his long-term future. That future may of course be one which sees him returned to live permanently in England.

Stay or suspension of the order

106. Mr Turner invites me to stay or suspend the implementation of any order for return, to await the outcome of proceedings that are already in train in the overseas jurisdiction. He referred me to the decision of MacDonald J in *BK v NK* [2016] EWHC 2496 (Fam), at [52]-[57]. He suggests that this is a "paradigm case" for a stay or suspension given that the Russian court is already seised of the process, and has

[19] Lord Hughes *Re C (Children: Anticipatory Retention)* [2018] UKSC 8 at [3]

rejected the mother's claim for an interim order that K lives with her. I respectfully disagree. I would be failing in my obligations under the Convention if I suspended or stayed the outcome in such a way as to thwart its purpose i.e. to "order the return of the child forthwith" (*Article 12*). I agree with MacDonald J that the power to order a stay should only be exercised "in exceptional circumstances", and those do not exist here. I am pleased to note that the Russian Court is seised of the process; this will, I hope, accelerate the final resolution of any welfare-based application.

107. I will hear representations on any difficulties there may be in implementing this order, in the light of any travel restrictions continuing to affect travel between the UK and Russia because of the coronavirus (CV-19) pandemic.

108. That is my judgment on the substantive applications.

Schedule.

Judgment [11 June] on the Case Management Issues.

Variation/discharge of the requirement on the mother to produce documents relevant to her criminal appeal in Russia

109. As the history of the case reveals (see [6] to [24] above, but specifically at [10]), in the summer of 2018, in the Russian criminal court, the mother pleaded guilty to an offence of bribery and was sentenced to a term of imprisonment (4 years) and fined (three times the amount of the bribe). Her appeal against sentence was allowed in part on 21 August 2019. In respect of this process, I have seen a number of relevant documents including but not limited to:

    i) The judgment of the court giving the reasons for the terms of the sentence of the mother: 5 September 2018;

    ii) The judgment of the court allowing the appeal in part: 21 August 2019.

110. It appears from media reports at the time, and from a direct communication between the mother and the father (a WhatsApp message) that the mother had argued in the appeal that she had some caring responsibility for her children. Her term of imprisonment was postponed until K is 14 years old, allowing for her immediate release, but she faces the prospect of returning to prison in 5-6 years' time.

111. At the PTR the father sought sight of the documents lodged by or on behalf of the mother in support of the appeal, so that he could see how the mother had presented her case; his suspicion was that the mother had materially misled the court about her ability and/or her right to care for K.

112. I agreed, on the finest of balances, that the information could potentially be relevant to the issue of the mother's reliability/credibility – limited to checking whether she maintained a consistent case in relation to the circumstances of the children in the two jurisdictions. At the PTR I directed as follows:

> [17] The applicant shall, by no later than 6pm on 4 June 2020, file, and serve on the respondent's solicitors, a copy of the following information/documents:
>
> a. any written submissions or grounds that were deployed on her behalf for the purposes of her criminal appeal in Russia;
>
> b. a copy, or transcript, of the judgment and/or decision of the appeal court in Russia in respect of those proceedings; and
>
> c. ….

113. Acknowledging the mother's concern that the father should not be enabled to misuse documents disclosed in these proceedings in any Russian proceedings, I further directed:

> "[18] Subject to further consideration and any further directions that may be given at the hearing on 10 June 2020, no copy of any document served pursuant to paragraph 17(a) and/or 17(b) above, or any translation of any such document, shall be provided by the respondent's English lawyers (i.e. his solicitors and counsel in these proceedings) to the respondent himself, or to his Russian Lawyer or any third party. The contents of any such documents may be discussed with, but not shown to (in whole or in part) the respondent and his Russian lawyer by his English lawyers. Further, no copies of those documents or any translations thereof shall be included in the general court bundle for the hearing commencing on 10 June 2020, or the wording thereof quoted in any written submissions, but in the event that either party wishes to refer to such material at the final hearing it shall be provided to the court in a separate clip of material that is not provided to the respondent, or to his Russian lawyer or any third party without permission from the court."

114. The mother had in her possession a copy of the decision of the Russian criminal appeal court (see [17](b) of the order above), and disclosed the same; she did not disclose the documents at para.17(a) (above). Materially she filed a letter from her Russian lawyer (Ms Zhuravleva) which contained the following passages:

> "I [Ms Zhuravleva] am currently diagnosed with COVID-19, viral pneumonia, I am undergoing treatment, I am self-isolated. All documents of my clients are kept in the office, as they are legally protected secrets. I currently do not have access thereto, so I cannot provide the documents you request before my recovery.
>
> However I would like to draw your attention to the fact that all of the arguments of my cassation appeal are fully contained in the cassation decision dated 21 August 2019, as the court considered them when making its decision; in accordance with Article 401.14 of the Criminal Procedural Law of the Russian Federation, the cassation decision should contain all the arguments of the complaining party."

115. On 9 June 2020, the mother issued a Form C2, supported by a witness statement, seeking a variation or discharge of the earlier order insofar as it had not already been complied with. This application was opposed.

116. I could not but accept at face value the assertion of the mother's lawyer in the first quoted paragraph above that she is unwell, and cannot therefore access the documents at para.17(a) of the order at this time. I am less convinced by the assertion she makes in the second paragraph, but I am of the view that the information contained in the documents is not so pivotal to the decision which I have to reach as to justify adjourning the case at this late stage to await the lawyer's recovery and the production

of the documents. I therefore acceded to the mother's application to discharge para.17(a) of the directions.

Leave to adduce a second expert report on Russian law and specifically on the issue of Article 3 / Article 5(a):'breach of rights of custody'

117. In the father's formal 'Answer' to the mother's application filed pursuant to *rule 12.49 Family Procedure Rules 2010* ('*FPR 2010*'), he asserted, inter alia, that:

> "(ii) As at the date of that removal of the subject child from Russia the applicant mother did not have rights of custody in respect of that child;"
>
> "In the alternative to (ii), the applicant mother was not exercising any rights of custody in respect of the subject child and nor would she have been exercising any such rights but for the removal"

118. As I have reflected in the body of this judgment (see [62] above), Mr Turner explained that it is the father's case that, under Russian law, the existence of the "live with" order in his sole favour made by DJ Gibson meant that he was entitled to have the child "live with" him in any country unless and until positively restrained, and that he did not require the consent of the mother or permission from the court for an international move of the child. He therefore maintained that the removal or retention of K was not in breach of the mother's rights.

119. In a position statement prepared for the PTR, Mr Turner indicated that he wished to adduce evidence from an expert in Russian law on the issue of the mother's 'rights of custody', and specifically whether these rights were breached by the father's removal or retention of K. This request was not accompanied by any formal application, statement, or proposed draft letter of instruction; indeed no attempt had been made to comply with *section 13 Children and Families Act 2014* or *Part 25 FPR 2010* (esp. *rule 25.7* and *PD25C*) prior to the hearing. It was (as Mr Harrison was later aptly to describe it) a somewhat "impromptu" application, which was opposed on behalf of the mother.

120. Having heard detailed argument on the issue, I was persuaded that the issue was of such central importance to the case that it was indeed 'necessary' (*section 13(6) Children and Families Act 2014*) for the issue of 'rights of custody' of the mother in Russia properly to be explained by an expert in the field, and I therefore authorised the joint commissioning of a single joint expert. Following further submissions as to the identity of the expert, I rejected the father's proposed names, and authorised the instruction of Miss Elga Suykiyaynen as the single joint expert (the 'SJE'). She had been the SJE (in fact proposed by the father) in the 2018 proceedings in the Central Family Court; she is a member of the IAFL and has an extremely impressive CV. She was instructed on an agreed letter of instruction on 28 May, and she prepared a report dated 2 June.

121. On 9 June 2020, the father issued a C2 application seeking leave to adduce a *second* expert report (already prepared) on this issue from a Russian lawyer, Ms Galina Pavlova. This application was unsurprisingly opposed on behalf of the mother. At

the point of deciding whether to allow Mr Turner to rely on this evidence, I had not seen her report or her letter of instruction but had the gist of its contents.

122. In making the application on the first day of the final hearing, Mr Turner informed me that, on receipt of the report from the SJE, he and his instructing solicitor had instructed Ms Pavlova to review the report and to express a view as to the accuracy and reliability of the SJE's summary of the law. Mr Turner accepted that it was in his contemplation at the point of instructing Ms Pavlova that in the event that Ms Pavlova responded with a markedly different view to that expressed by the SJE he would probably seek to adduce it into the proceedings. Ms Pavlova had been sent a copy of the SJE report, and the court order of DJ Gibson in order to equip her with the relevant basic information.

123. I distil Mr Turner's case thus:

i) Neither he nor his solicitor had given the issue of disclosure of documents from the proceedings "much thought at the time", but in fact the disclosure of the SJE report, and the order of DJ Gibson was permitted under *section 12 Administration of Justice Act 1960*, when read with *rule 12.73(a)(iii)* and *rule 12.75 FPR 2010*; it was open to him to obtain his own advice;

ii) Although the SJE had been used in the earlier (2018) proceedings, the father had not agreed the identity of the SJE for this exercise; she had been imposed by the court;

iii) The application or interpretation of foreign law was not a science always or necessarily yielding clear cut or simple answers; it was an issue on which reasonable disparity of view could be expected, and in this respect, the court should be more tolerant of the need to receive the view of a second expert;

iv) Although these proceedings are summary, they still need to be conducted "justly" (*rule 1.1(1) FPR 2010*) and "fairly" (*rule 1.1(2)(a) FPR 2010*);

v) He referred to, and relied on, the judgment of Lord Woolf MR in *Daniels v Walker* [2000] 1 WLR 1382 at p.1387:

> "Where a party sensibly agrees to a joint report and the report is obtained as a result of joint instructions in the manner which I have indicated, the fact that a party has agreed to adopt that course does not prevent that party being allowed facilities to obtain a report from another expert or, if appropriate, to rely on the evidence of another expert.
>
> In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular

> part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence."

vi) Accepting that he had not put questions to the SJE in accordance with Lord Woolf's guidance in *Daniels v Walker* (p.1387F-G) and/or *rule 25.10(2)(d) FPR 2010*, he submitted that this was not an issue on which he required "clarification"; his case is that the SJE has materially erred in her opinion;

vii) He broadly accepted the argument advanced by Mr Harrison that *good reason* needed to be advanced to justify any further reports once one has been obtained (see *R v Local Authority & Others* [2011] EWCA Civ 1451 at [33]/[34] and *Re SK (Local Authority: Expert Evidence)* [2007] EWHC 3289, [2008] 2 FLR 707), but contended that *good reason* exists here given the significance of the point and the apparent discrepancy of the opinion.

124. Mr Harrison argued:

i) *Section 13* of the *Children and Families Act 2014* is clear both in spirit and letter in controlling expert evidence; it should be firmly applied in excluding this additional evidence;

ii) The father did not raise the issue of rights of custody at the first case management hearing on 26 March when the issue of expert evidence should have been raised; the issue had been raised for the first time only when he filed his Answer (7 April 2020), and no effort had been made to secure expert opinion on the issue until the eve of the PTR;

iii) Usually a court determining an application under the 1980 Hague Convention would be satisfied by seeing a "certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State" (see *Article 7*, *Article 8* and *Article 14*[20] of the *Hague Convention 1980*); such an opinion had been obtained in the instant case from Ms Markelova (see [57])

iv) This is a *summary* process, which is to secure the 'prompt' return of the child, emphasised by *Article 1* of the *1980 Hague Convention 1980*; he referred to *Re P (Abduction: consent)* [2004] 2 FLR 1057 at [25] where the court had deprecated the indulgence of expert evidence from both parties:

> "This is a child abduction case and as Art 1 of the Hague Convention makes clear its underlying objectives are the prompt return of a wrongfully removed child and the protection of the rights of custody and access in the State

[20] In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable

> from which the removal has taken place… These are cases in which, quintessentially, summary decisions are required to resolve in which of two States the child's future is to be decided" (Ward LJ)

The summary nature of the process is reinforced by the obligation to deal with the case "expeditiously" (*rule 1.1(2) FPR 2010*) and "proportionately"; he submitted that I should actively "control" (*rule 1.4(2) FPR 2010*) the use of expert evidence by refusing this application;

v) *Daniels v Walker* is now somewhat out of date, long preceding the introduction of the tighter regime for the instruction of experts in family cases under *Section 13 Children and Families Act 2014* and *Part 25 FPR 2010*;

vi) It is apparent from the letter of instruction that Ms Pavlova was not asked to give a free-standing opinion on the relevant law, but was asked to critique the report of the SJE; this rendered it altogether less useful to the court;

vii) Good reason needed to be shown before the court should admit further expert evidence, and Mr Turner had failed to discharge the obligation to demonstrate this.

125. Having heard argument, I advised the parties that I would reluctantly allow the father to adduce the evidence of Ms Pavlova. I further directed that Ms Pavlova's report should be sent forthwith to the SJE so that she could consider its contents before I heard argument on the applications. As it happens, the SJE prepared her comments on the report of Ms Pavlova overnight, and her response was with us all well before the resumption of the hearing the next day.

126. Notwithstanding the egregious failure to comply with the requirements of statute, and the rules, my reasons for allowing the admission of this second report are as follows:

i) The issue of whether the father breached the mother's 'rights of custody' is central to the application. It is certainly of sufficient importance to my determination of the application that I would be slow to shut out ostensibly credible evidence relating to it;

ii) I was satisfied from what I had heard that Ms Pavlova possesses the relevant qualifications to produce a reliable report;

iii) While accepting that *section 13 Children and Families Act 2014* should be applied strictly to control expert evidence, the discretion afforded to the court – in line with the factors listed in *section 13(7)* – is still broad;

iv) There was time to obtain the views of the SJE on the report of Ms Pavlova before the case was argued.

127. I would nonetheless like to add this. The father and his lawyers placed the court, the mother, and the mother's lawyers, in a very difficult position by failing to advance their case to adduce expert evidence in this case either in a timely or appropriate way. Their approach subverted the family procedure rules and the principles which underlie

them; they ignored *section 13* of the *2014 Act* and *Part 25 FPR 2010*, in whole or in part, and presented their case, in two consecutive hearings, in (I accept, uncharacteristically) a thoroughly disorganised way. While I was tempted to reject the application for the admission of the report from Ms Pavlova simply because it had been presented in such an irregular manner, I was clear that my obligation is to conduct the hearing 'justly' (*rule 1.1 FPR 2010*) in order to reach a 'just' outcome for K.

128. Practitioners should remember that the court expects to consider "the filing of evidence including expert evidence" (*rule 12.48(1)(k) FPR 2010*) "as soon as practicable" after an application under the *1980 Hague Convention* has been issued; this is clearly echoed in *rule 25.6 FPR 2010*. Very rarely will the indulgence which I have extended to Mr Turner and his instructing team in this case be so extended.

129. That is my judgment on the preliminary issues.