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Neutral Citation Number: [2022] EWHC 3397 (Fam)

Case No: FD22P00516

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

-

Remote hearing by MS Teams as from
The Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 20 December 2022

Before :

Mr Justice Moor

- -

Between :

ES

Applicant

-and-

DC

Respondent

- -
- -

Ms Charlotte Baker (instructed by International Family Law Group) for the **Applicant**
Ms Cliona Papazian (instructed by Sam Solicitors) for the **Respondent**

Hearing dates: 19th to 20th December 2022

- -

JUDGMENT

MR JUSTICE MOOR:-

1. I have been hearing an application pursuant to the Hague Convention 1980 made by Mr ES (hereafter "the Father") for the summary return of the two children of the family to Turkey. The Respondent is Mrs DC (hereafter "the Mother").

2. The elder child is Y, a boy, who was born in 2014. He is therefore aged 8. The younger child is M, a girl, who was born in 2018. She is therefore aged 4.

3. The Mother seeks to defend the application on the basis that the children are settled in this jurisdiction pursuant to Article 12; that Y objects to being returned and he has attained an age and degree of maturity at which it is appropriate for the court to take account of his views pursuant to Article 13; and that there is a grave risk that the children's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation, pursuant to Article 13(b).

The relevant history

4. The Mother was born in England in 1977. She is therefore aged 45. She is currently residing with the two children at a confidential address in this jurisdiction. The Father was born in Turkey in 1982. He is therefore aged 40. He resides in Turkey.

5. The parties met when the Mother went to Turkey on holiday to see her step-mother in June 2009. It may have been something of a holiday romance, although the Father was known to the step-mother's family. They began to cohabit in November 2009 and married in Turkey on 30 December 2009. Initially, two of the Mother's four elder children by previous relationships resided with them, namely T, who is now aged 17 and C who is now aged 15. T soon returned to this country with his father after allegations were made of domestic abuse against him from this Father. The Father strenuously denies any such abuse.

6. There seems little doubt from the account given by both parties that their relationship was volatile and mired in violence. They both accept there was physical and emotional abuse. The difference is that they blame each other. For example, in 2014, the Father asserts that the Mother punched him in the face and that he scratched her in trying to defend himself. The only difficulty with his account is that he accepts that he was prosecuted for assault on the Mother. He pleaded not guilty but was convicted and fined. He says he did not have to pay the fine as he was of previous good character.

7. The Mother accuses him of assaulting her and the children. For example, she says that, in March 2018, whilst she was pregnant with M, he grabbed her by her pony tail. When she fell to the floor, she says he kicked her in the stomach. He denies any such incident took place.

8. In December 2015, the Mother took Y to the United Kingdom for an extended holiday, initially with the Father's consent. She did not return to Turkey. The Father started proceedings in Turkey. The Mother returned voluntarily in July 2016, claiming that she was forced to return due to financial problems. The Father argues that this shows that she is not afraid of him. I merely note that, if there has been coercive and controlling behaviour, this is not an assumption that the court can safely make.

9. In late 2018, the Mother says the Father lost his job. They agreed that the Mother would take the children on a holiday to England to visit the Mother's other children. The Father had hoped to come as well but his request for a visa was turned down. The Mother and children left Turkey on 15 December 2018, almost exactly four years ago. The agreement was that they would return to Turkey in January 2019.

10. In January 2019, the Mother asked the Father if she could remain in this jurisdiction until June 2019 to arrange for her older daughter to move to Turkey. The Father agreed but there was an argument. The Father says that the next thing he heard was in April 2019 when a friend informed him that the Mother took the view that the relationship was over and that she would not be returning. He says he tried to contact her without success. There is no doubt that the Mother did not return in June 2019. Indeed, she and the children have been present in this jurisdiction ever since. This was therefore a wrongful retention of the children, sufficient to engage the provisions of the Child Abduction and Custody Act 1985.

11. The Father contacted the Turkish Central Authority in November 2019. The case was allocated by our Central Authority to a firm of solicitors in London. The Father was granted legal aid but, for reasons that have not been explained, proceedings were not issued for a further two and a half years. I have not heard from this firm of solicitors so must be careful what I say. I have been told by Ms Charlotte Baker, who appears on behalf of the Father, instructed by entirely new solicitors, the International Family Law Group, that the previous firm informed the Father on 11 October 2022 that they could not continue to act for him because they may have been negligent in the conduct of his case as a result of their delay in submitting his application to the Court.

12. In March 2020, the Mother sought a divorce in this jurisdiction. The Father's previous solicitors did write to the Mother in March 2021 and seek the return of the children or an order for contact. The letter suggested mediation. On 17 June 2021, the Mother said that she would not return to Turkey due to the domestic abuse she had suffered. A decree nisi of divorce (conditional order) was pronounced on 26 January 2022. The Mother says it was made absolute (final) in March 2022.

13. The Father's solicitors finally completed the application that I have been hearing pursuant to the Hague Convention on 28 February 2022, but it was not issued until 21 July 2022. I do not know if this further delay was as a result of failings by HMCTS, or the Father's then solicitors, or a combination of the

two. It does not matter. It is agreed that it is the 21 July 2022 that is the operative date for settlement purposes. The application made the point that the Father had not had any contact to either child since January 2019.

14. The Father's first statement is dated 15 February 2022. He says he was not physically or emotionally abusive to the Mother. On the contrary, he accuses her of having problems managing her anger and emotions. He claims that she was paranoid that he was cheating on her. He says she told him she had previously self-harmed by cutting her arms. She would threaten to hurt herself and then accuse him of doing it. She would kick and punch him. She would throw plates and glasses at him. She told him she had been diagnosed with bi-polar disorder. She had broken his nose in 2014 when she punched him. He says he scratched her in self-defence. It is here that he accepts he received a criminal sanction, although he claims it was a suspended sentence and a fine. He denies ever physically chastising Y or being emotionally abusive to the Mother's other children. He offers protective measures, namely that he will not institute criminal or civil proceedings for child abduction in Turkey; that he will not remove the children from the Mother's care; that he will not enter her accommodation save for contact; and that he will give her 72 hours notice of any hearing in Turkey.

15. The first hearing was before Lieven J on 8 August 2022. Neither of the counsel instructed before me appeared at that hearing. The order provided for mediation but on the basis that Cafcass will speak first to Y to see whether mediation would cause him undue distress. There was no order for interim contact. The Mother was not to remove the children from the jurisdiction. Directions were made. Cafcass was to prepare a report as to interim contact and any defences the Mother might raise. The Mother was to send updates about the children and photographs of them to the Father monthly. On 15 August 2022, Cafcass asked for an order for a full welfare assessment.

16. The Mother's Answer is dated 21 September 2022. It pleads one defence only, namely intolerability pursuant to Article 13(b). There was no mention of settlement or child's objections.

17. The Mother's main statement is dated 21 September 2022. It gave her former address in W. She says that Y has suffered physical and psychological harm as a result of the conduct of the Father. She alleges that the Father's behaviour changed after the wedding. Thereafter, domestic abuse was ongoing. She was slapped. She was punched on the nose. Her older son T had a split lip. T later said that the Father had hit him and locked him in a cupboard. Her other older son, C, had been slapped across the face with a book. She asserts that she complained to the Police many times, but the Father was taken to court on only three occasions and given a fine on each occasion. She says that, when she returned to Turkey in 2016, she left C with his father. The domestic abuse took place in the presence of Y. She was punched repeatedly whilst breast-feeding Y. She was hit over the head with a knife. The result was that Y was covered in her blood. The Father cut her hair off and put a plaster on her head but refused to take her to hospital. Later, Y accused the Father of placing a hand over his face and locking him in the boot of his car. In relation to the

incident in March 2018, when she was 7 months' pregnant, she asserts that the Father grabbed her ponytail such that she hit the floor. He then kicked her in the stomach repeatedly. She was screaming. Y was screaming. Y jumped on the Father. The Mother had blood in her eyeball. Y said that the Father had smacked him whilst he was blindfolded with his hands behind his back and locked him downstairs in the cellar. She says that, before she and the children left for the UK, the Father apologised to her for his behaviour. She could not have left Turkey without him signing forms to permit her to leave with the children, so she had to accept his apology. She ends by saying that Y feels safer in the UK. T and C have had long-term psychological problems as a result of the abuse, although T is better now. The Father has shown no remorse. She cannot contemplate even video or telephone contact.

18. The case came before Sir Jonathan Cohen on 10 October 2022. By then, both counsel who now appear before me were representing their respective clients. The Mother, entirely predictably, indicated that she wished to rely on settlement and child's objections as well as grave harm. She was not prepared to engage in mediation because of the allegations of domestic abuse. She was refused permission to rely on a CAMHS report as to T and C, her older non-subject children. Her application to discharge the order that she provide photographs to the Father was refused. A Cafcass report was directed and this final hearing set down with a two-day time estimate.

19. The Mother filed a second statement dated 17 October 2022 to deal with protective measures. She says that there are no protective measures that can answer the harm that would be caused by a return to what she describes as a highly dangerous situation. The children are settled here. It is the only country M has ever known. Y associates Turkey with a very bad time in his life. She and the children have no ongoing relationship with any of the paternal family, who have not contacted her since she came to this country. T and C both needed the input of CAMHS due to the abuse they suffered. Y is emotionally and psychologically disturbed by it. She says that the Turkish Police said they could not protect her and that the best advice they could give her was to leave the country. No injunctions were made against the Father in Turkey. He was just fined. She does not speak Turkish and neither do the children any longer. The Father did not offer to pay for their flights back, nor for their accommodation in Turkey nor to provide any ongoing financial support. He is wholly in denial and does not even offer a non-molestation undertaking.

20. On 1 November 2022, the Mother applied for permission to instruct a psychologist as to the impact on her mental health of a return to Turkey and the likely effect on her parenting of the children. This application was granted by Arbuthnot J on 15 November 2022. The psychologist was Dr Eldad Farhy, who was to conduct a remote assessment of the Mother. A direction was also made for the Mother to file a statement as to her mental health treatment in Turkey and her medical records.

21. The Mother's third statement is dated 18 November 2022. She says she did go to hospital in Turkey in 2017 at the height of the abuse she received from the

Father. She was diagnosed with bi-polar affective disorder (BPAD) and prescribed lithium. She stopped taking the medication when she was pregnant with M. In the UK, she was again prescribed lithium and referred to a psychiatrist.

22. The Father's second statement is dated 25 November 2022. He complains that his first firm of solicitors did not issue the application for two and a half years despite him chasing them significantly. The Mother did learn how to speak Turkish. They were together for 12 years. They had their ups and downs but he was not violent to her. The Mother has an extremely erratic and explosive personality. She would become enraged very easily. She would leave the children in his care. He had an enormously close and loving relationship with them. The Turkish courts should decide. He reminds me that the Mother herself had previously seized the Turkish courts. There is a fully functioning justice system in Turkey and it is not appropriate to describe the system as corrupt. Domestic violence is, he says, taken very seriously. He then repeats that it was the Mother who punched him. She was jealous. He never laid a hand on her but she headbutted him. T's split lip was caused by a fight with C, during which he fell. The Mother told the authorities in Turkey that T's allegations were false. When Y was a baby, the Mother became catatonic with rage. She was throwing plates around. He put his hands around her to stop her, which caused some bruises on her arms. He says he pleaded Not Guilty but was convicted and was fined 5,000 Turkish lira. I note that he previously said that his conviction followed him scratching her in self-defence, after she punched him in the face. He says that, on a second occasion, a child said he assaulted her, but he was found Not Guilty. He then accuses the Mother of stabbing his calf. Turning to the position in Turkey if I order the Mother to return, he says that she could easily find accommodation. He will undertake not to harass, intimidate or pester her. He complains that the children have all but lost their Turkish heritage. He has been airbrushed out of their lives. He then asks how they can be truly settled in the absence of their Father.

23. The psychological report of Dr Eldad Farhy, a consultant counselling and psychotherapeutic psychologist, is dated 28 November 2022. It is right that he does say that the Mother is above the 99.9th percentile for "self-deceptive enhancement". In this context, this means that she has a tendency to modify her responses so as to give those she believes would best serve her purposes. Her image management score was in the 95th percentile. Having said that, the doctor confirms that the Mother is taking medication for depression and anxiety. She has significant emotional distress and a long history of recurrent depressive episodes overlapping with EUPD traits (Emotionally Unstable Personality Disorder). These do not stop her functioning most of the time but emotional control issues seem a recurrent difficulty. It is a more significant problem when major life stressors occur. If she was to return to Turkey, there is a high likelihood that her mental health will be negatively affected. If she thinks it will happen, it will. If it does happen, she is likely to be less available to the children. She is fragile. Remaining in the UK would be in her best interest.

24. The Cafcass Officer, Kay Demery reported on 6 December 2022. She had spoken to the Mother's then Local Authority which said that there had been a referral to them from a psychiatric hospital in February 2020 as the Mother's then partner had issues with alcohol and suicidal ideation. There was then a referral from the police in March 2020 following a domestic incident. The children were not judged to be at risk of significant harm as the couple had, by then, separated. In April 2021, there was a further referral as a friend of the family had reported to the police that M might have been molested by the former partner. The Mother says that this did not, in fact, happen. The Mother had shown insight and the case had been closed on 13 June 2021.

25. Ms Demery did note that the children have been in temporary accommodation since August 2022 when they lost their previous one bedroom maisonette where they had been since June 2019. This was through no fault of their own as the landlord needed the property back on a no-fault basis. They are currently in a one bedroom apartment in a hotel. Y told Ms Demery that Turkey was too hot. He had bad memories of his Father smacking him. He was scared of his Father. He could not imagine ever wanting to see his Father. He reported domestic abuse by his Father against his Mother. He gave a score of 10/10 for wishing to stay in this country and 10/10 for not wanting to return to Turkey. He is struggling at school. The school says that he rarely shows enthusiasm and often disengages. M is below the attainment of her peers other than in relation to speaking. She is, however, interested to learn and very sociable. The Mother, however, struggles with M's behaviour at home. Y is a delightful young boy. He was polite and cooperative but he does not have capacity to make decisions in his best interests.

26. Ms Demery then deals with the defence of settlement. She says that the children have experienced much instability throughout their lives. The temporary accommodation is through no fault of their Mother. Y has had the stability of the same school for almost three years. He feels safe here. A return to Turkey is likely to be destabilising for him. Ms Demery wonders how he would cope and manage if he was removed from his country of residence. Ms Demery's overall conclusion is that the children are settled in the care of their Mother in this jurisdiction, other than that they have no relationship with their Father. Ms Demery then says that the Mother takes quetiapine and sertraline for her symptoms of depression and anxiety. Whilst this could impact on the care she gives, and she does struggle, she is reaching out for support. Ms Demery considers there is a considerable risk of emotional harm if there was an order for return to Turkey. She cannot see how a return to Turkey would promote the children's welfare. She did say that she did not believe it was necessary to join the children as parties.

27. Ms Demery's conclusion is that the children are settled here, having been living here with their Mother for four years. They have not benefitted from the security and stability that other children experience in their early childhood. From an emotional perspective, their home is closely related to their Mother's home that she has established as she is their primary carer. Their English schooling is the only school experience they have known. They speak English, not Turkish. They hold connections to family and friends here.

If there was an order for return, it would not be appropriate for them to be cared for by the Father so, if the Mother was unable to return to Turkey, there would have to be a referral to Children's Services in Turkey. Finally, in relation to contact, she said that it would be necessary to consider the risks further before contact could be ordered.

28. Russell J heard the Pre-Trial Review on 8 December 2022. She directed that the Father was to file all Turkish Police reports and medical documentation in respect of the Mother by 15 December 2022. He has not done so but I do not intend to hold this against him as I am by no means clear how easy it would be to obtain such information, particularly at short notice. She also directed that the Mother should send the Father up to date photographs of the children together with an update on their welfare. The Father makes the good point that it was only when he received the report of Ms Demery that he learned what had been happening to the children over the last four years.

The law I have to apply

29. The Hague Convention 1980 on the Civil Aspects of Child Abduction was incorporated into English and Welsh law by the Child Abduction and Custody Act 1985. It declares the need "*to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection of rights of access*".

Settlement

30. The Convention is, however, based on applications being made promptly so that, in an appropriate case, the children can be returned home quickly before too much damage is done. In these so called hot-pursuit cases, Article 12 requires a return to the country of habitual residence if a period of less than a year has elapsed from the date of wrongful removal or retention. The situation is, however, different if more than a year has elapsed. The second paragraph of Article 12 provides as follows:-

> "*The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."*

31. It is for the mother to satisfy the Court that the children are settled. It is agreed that the reference to "proceedings" means the issue of the application in this country, namely 21 July 2022, rather than the date on which the application was lodged with the Turkish Central Authority (see, for example, the dicta of Wilson LJ at paragraph [54] of Re O (Abduction: Settlement [2011] 2 FLR 1307). In this case, this is of real significance. If the defence is established, and discretion comes into play, the period after the application date then forms part of the picture for consideration.

32. The leading Court of Appeal authority is Cannon v Cannon [2004] EWCA Civ 1330; [2005] 1 FLR 169 where Thorpe LJ said:-

> *"[53]… A broad and purposive construction of what amounts to 'settled in its new environment' will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay…*
>
> *[61] I would unhesitatingly uphold the well-recognised construction of the concept of settlement in Article 12(2): it is not enough to regard only the physical characteristics of settlement. Equal regard must be paid to the emotional and psychological elements. In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement is much increased.*

33. Whilst the reason for the delay is relevant, this is particularly so where there has been concealment. There has not been concealment in this case.

34. Williams J in AH v CD [2018] EWHC 1643 added the following important principles at paragraphs [41] to [42] of his judgment:-

> *"(1) The proceedings must be commenced within one year of the abduction. The making of a complaint to police or an application to a Central Authority does not suffice.*
>
> *(2) The focus must be on the child. Settlement must be considered from the child's perspective, not the adult's. The date for the assessment is the date of the commencement of proceedings not the date of the hearing. This is aimed at preventing settlement being achieved by delay in the process.*
>
> *(3) Settlement involves both physical and emotional or psychological components. Physically, it involves being established or integrated into an environment compromising a home and school, a social and family network, activities and opportunities. Emotional or psychological settlement connotes security and stability within that environment. It is more than mere adjustment to present surroundings.*
>
> *(4) Concealment and delay may be relevant to establishing settlement. Concealment is likely to undermine settlement. Living openly is likely to permit greater settlement. The absence of a relationship with a left behind parent will be an important consideration in determining whether a child is settled.*
>
> *(5) A broad and purposive construction will properly reflect the facts of each case – it does not require a 2 stage approach but must, to use a probably over-used expression, involve a holistic assessment of whether the child is settled in its new environment. It has to be kept in*

mind that the settlement exception is intended to reflect welfare. The Article 12 settlement exception of all the exceptions is most welfare focused. The underlying purpose of the exception is to enable the court in furtherance of the welfare of the child to decline a summary return because imposing a summary return (i.e. without a more detailed consideration of welfare) might compound the harm caused by the original abduction by uprooting a child summarily from his by now familiar environment."

35. He ends his review by adding:-

> *"As I have said earlier, there is clearly a degree of overlap between the concepts of settlement and habitual residence. Settlement does not require a complete settlement, any more than habitual residence requires full integration. Settlement is plainly an evaluation which is, to some degree, subjective. There will be a spectrum ranging from the obviously and completely settled to the very unsettled. In between, there are many possibilities."*

Child's objections

36. Article 13 provides that:-

> "*The judicial or administrative authority may also refuse to order the return of the child if it finds 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 its views."*

37. The law is now well settled and is to be found in Re M (Republic of Ireland) [2015] EWCA Civ 26; [2015] 2 FLR 1074. It was summarised by MacDonald J in H v K [2017] EWHC 1141 (Fam) as follows:-

> *"(1) The gateway stage should be 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.*
>
> *(2) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.*
>
> *(3) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.*
>
> *(4) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.*

(5) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

(6) 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 the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations (Re M [2007] 1 AC 619).

Article 13(b)

38. Finally, Article 13(b) provides that the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

> *"(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".*

39. The correct approach has recently been summarised by King LJ in Re IG [2021] EWCA Civ 1123 as follows:-

> "*(1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".*
>
> *(2) The focus is on the child. The issue is the risk to the child in the event of his or her return.*
>
> *(3) The separation of the child from the abducting parent can establish the required grave risk.*
>
> *(4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.*
>
> *(5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be*

appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.

(6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.

(7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

(8) In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there.

(9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.

(10) As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks."

Discretion

40. Finally, I must briefly consider the law on discretion. The decision is "at large" (see Re M (Abduction: Zimbabwe) [2007] UKHL 55. In Re G, Peter Jackson LJ said at [41]:-

> *"To sum up, the exercise of the discretion under the Convention is acutely case-specific within a framework of policy and welfare considerations. In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare.*

In a consent case, the better view is that the weight to be given to the policy considerations of counteracting wrongful removal and deterring abduction may be relatively slight, while the weight to be attached to home-based decision-making and comity will depend critically on the facts of the case and the view that the court takes of the effect of a summary return on the child's welfare."

The evidence that I heard

41. At the request of the parties, the hearing took place remotely by MS Teams. I am quite clear that it was an entirely fair hearing, fully compliant with Article 6 of the European Convention on Human Rights. I heard oral evidence from two professional witnesses, namely the Cafcass Officer, Kay Demery and Dr Eldad Farhy. The evidence given was illuminating not just for what was said by the two witnesses but also by the demeanour and attitude of the Father, on the video-link from Turkey.

42. Ms Demery gave her evidence first. She told Ms Cliona Papazian, who appears on behalf of the Mother, that she had concluded that both children are settled within the meaning of Article 12 of the Convention. She added that this was not a situation where the family had moved around the whole of the UK. They have been in a similar area throughout. Although their housing situation is now problematic, Y has been at the same school since 2020, such that there is a level of stability for him even if his housing is not stable. Ms Demery also pointed out that the family had occupied the previous accommodation from June 2019 until August 2022. This is important as it means the family had been in that accommodation for over two years on the operative date, namely the date on which this application was issued. Ms Demery added that the Mother is the children's primary carer and the bond between them is very strong and affectionate. The involvement of the Local Authority Children's Services was short lived, although it does point to the Mother's vulnerabilities. She was asked about the allegations made by Y in relation to his Father's behaviour. She said that Y had told her that he doesn't speak to the Mother about this. The impression Ms Demery got was that his allegations were his lived experience. Ms Demery reminded me that it was clear from the evidence of both parents that their relationship was beset with volatility and violence on either account. She was then asked about Y's level of maturity. She said that, in her view, he has not reached an age and level of maturity where his views could be determinative. Finally, Ms Papazian asked her about the effect of a return to Turkey. Ms Demery said it would be incredibly destabilising for them to return to Turkey. The impact on the Mother would be incredibly stressful and may have an emotional impact on her care for the children.

43. She was then asked questions by Ms Charlotte Baker, on behalf of the Father. She said that she knew of only the two places where the family had lived in

the UK since the Mother's return but she was not clear about the situation before June 2019. Indeed, the Mother's evidence was that she was sofa-surfing during that period, so it is highly likely the family was not settled, but that is not the test I have to conduct as settlement does not arise until a year has been completed. Ms Demery was then asked about the Local Authority involvement. She said that the Mother did not tell her at first, although she did say that she was not in a current relationship. When Ms Demery discovered the history from the Local Authority, she telephoned the Mother and asked her about it. The Mother said she had not disclosed it as she had understood Ms Demery was only asking about whether there was current Local Authority involvement, which there was not. Ms Demery thought this a bit surprising, as do I, particularly as the Mother knew that Ms Demery intended to ask the Local Authority. I do not, however, see how this is relevant to the task I have to conduct, other than it might be some indication that I should be very cautious before accepting the Mother's evidence in general. Ms Demery had then asked the Mother about the issue of possible sexual harm to M. The Mother was aware of the risk, although she said that sexual abuse was found not to have taken place. Ms Demery added that the important thing was the children's current circumstances. In her view, they are settled now, even though they have previously had a very difficult childhood.

44. She was asked again about the possibility that the Mother had influenced Y to make his allegations against the Father. She said that you can never rule out the possibility of influence by a carer, whether directly or indirectly but she referred to Y telling her that the Mother does not talk about it with him. Ms Demery had found it hard to get any sense from the children that the Mother had shared with them such events. Ms Demery clearly took the view that Y was talking about events he had actually seen, even if he may have got some of the details wrong. Ms Demery did confirm that it would be very damaging if the children had been fed untrue comments, but she clearly did not believe that it was the case here. Finally, she was asked about Dr Farhy finding that the Mother's deceptiveness score was on the 99.9th centile. She said that she had given it some thought. It perhaps had some echoes of the Mother's responses when Ms Demery asked about whether there had been any Local Authority involvement, particularly as the Mother knew Ms Demery was going to check. I make it clear that I accept Ms Demery's evidence in its entirety. She is a very experienced Cafcass Officer, particularly in dealing with this sort of international case. I am confident that she is correct in both her assessment and her conclusions.

45. I now turn to the position of the Father during Ms Demery's evidence. He was undoubtedly incredibly distressed. It is common for litigants to be distressed, particularly if they have not had a relationship with their children for four years. Initially, I was of the view that the distress was understandable, if a bit extreme. As the morning went on, however, it began to take on an altogether different character. Indeed, I am of the view that it became quite sinister. By the end, the Father was clearly unable to control his emotions. I saw, at various moments, gestures, threats, sarcastic clapping and pure anger. I find he was emotionally dysregulated. It was very concerning. If he behaves in this way during a court hearing, I have grave reservations as to how he would

behave with the Mother if she was to return to Turkey. Ms Papazian understandably complained about his behaviour at the end of Ms Demery's evidence. Ms Baker spoke to the Father over lunch and obtained an apology from him but he did not attend the hearing in the afternoon at any point. I do not speculate as to why that was.

46. After lunch, I heard form Dr Farhy. Initially, Ms Papazian indicated she had no questions for him. He told Ms Baker that the Mother had struggled with her mental health since 2002. She has had recurring depressive episodes. He then said that trauma is in the eye of the beholder, meaning that it is possible to have a negative reaction because you are convinced you will have a negative reaction to a situation. The Mother has been able to function for long periods without difficulty, but then she reacts to stress, leading to the recurring depressive episodes. At the time she was in Turkey, she might have been unable to cope but he was of the view that these stresses were eased by her moving away from Turkey and that it had enabled her to recover and give herself greater resilience.

47. Ms Papazian then asked if she could, in fact, put some questions to Dr Farhy arising out of what he said to Ms Baker. I permitted this on the basis that, normally, Ms Papazian would have asked questions after Ms Baker. Dr Farhy said that experiencing future stress would negate his comments about the Mother's greater resilience. He was unable to say, however, if a return to Turkey would be so overwhelming that it would trump each and every other factor but he thought a return was likely to be quite significant and the Mother could react in a very acute way. Again, I accept his evidence, which was given thoughtfully and carefully.

<u>My conclusions</u>

48. I will deal with the three defences raised in turn before moving to consider my discretion, if I find any of the defences established.

49. I am clear that the defence of settlement is established. I have accepted the evidence of Ms Demery. I agree with her conclusions. These children had been in this country for three and a half years when the application for a return to Turkey was issued. At that point, they had lived in the same property for just over two years. Y had been in the same school for eighteen months. He was clearly getting significant support there. I believe he had attended the school during lockdowns as a vulnerable child, but I may be wrong about that and it is not crucial to my decision. M had been in the pre-school nursery at the same school for over six months. The Mother's abusive relationship had ended. There was no longer Local Authority involvement. Ms Demery found the children were well looked after and with a close attachment to their primary carer, the Mother. There had been some previous difficulties but I am satisfied that, by July 2022, these were no longer operative. I accept that the children had no relationship with their Father but that is the situation in many of these cases. They had not been concealed from him. Although it may not have been his fault that his application was delayed so long, I have to deal with it on the basis of the facts as they were when it was finally issued, not

what they might have been had he issued earlier. It follows that I am clear that the Mother succeeds on Article 12, although I must still consider my discretion to order a return notwithstanding that the children are settled here.

50. Despite finding settlement established, I have decided that I should make findings on the two other defences as well. I can deal very briefly with child's objections. I accept that Y objects to a return to Turkey. Ms Baker suggested it was only an objection to a return to his Father's care in Turkey, but I cannot accept that. I do note that Y said a couple of complimentary things about Turkey to Ms Demery, such as that school was fun, but, overall, his comments were very negative. He gave a score of 10/10 for not wanting to return there.

51. I do not, however, consider that he has attained an age and degree of maturity for me to say it is appropriate to take account of his views. He is only aged eight. He is achieving below the expected standard for his age in all subjects. He relies on adult support in all lessons. He often disengages and finds it hard to listen. He receives additional support for reading and he is on the Special Educational Needs register. Ms Demery says that his vocabulary and the manner in which he expressed himself was that of a younger child. He is most certainly not a Gillick competent teenager, whose views should be given great weight. To be frank, he is still of an age where adults should decide for him and not vice-versa. I accept the evidence of Ms Demery that he is at a stage in his development where he does not have capacity to make decisions in his best interests. I therefore do not find child objections established as a defence to which I must then apply my discretion.

52. Finally, there is the question of Article 13(b). I recognise entirely that the bar is set high here. Turkey is a signatory to the Hague Convention and I do not intend to find this defence proved as a result of any suggestion of inadequacy in its judicial system or its ability to protect the vulnerable. The Mother, however, says that I should find this defence proved for two reasons. First, she asserts that there was unacceptable domestic abuse, both to her and to Y, which she argues cannot be mitigated against given the lack of acceptable protective measures offered by the Father. Second, she says that the likely effect on her mental health of a return is also sufficient to invoke the defence, given the likely effect such a deterioration would have on the children.

53. The weight of authority is to the effect that I should take the allegations that the Mother makes at their highest, or at least deal with the case on the basis of what the position would be if they were true. In this case, however, I can go further. The Father admits there was an extremely volatile relationship between the parents. He admits he was convicted of assault on the Mother. He accepts that at least some of the abuse took place in the presence of the children. Ms Demery has found the allegations made by Y to be cogent and, on the balance of probabilities, does not believe they have been put in his mind by the Mother. I have accepted her evidence. I am then confronted by the demeanour of the Father during the hearing, when I was very concerned as to his behaviour even in a court setting.

54. I have also accepted the evidence of Dr Farhy. I find that it is likely that the Mother will suffer significant emotional distress if she is forced to return to Turkey and that this distress would be likely to affect her mental health adversely and, in consequence, her care of the children.

55. It follows that, prima facie, I am satisfied that there is a grave risk that the children's return to Turkey would expose them to physical or psychological harm or otherwise place them in an intolerable situation. I must then ask myself whether I can be satisfied that protective measures can be put in place to mean that this risk is removed or alleviated. I am absolutely clear that I cannot be so satisfied. Ms Papazian criticises the Father's offered protective measures. I accept that they are very limited. He offers no financial support whatsoever. I accept that this, of itself, cannot be a bar to a return order as there are many cases where the applicant has limited funds available. It is, however, something to put into the equation. The Father does not offer to pay for return flights. He does not offer to pay for accommodation or even assist with finding such accommodation for the Mother and children. He makes no offer of financial support at all. He did appear to say to Ms Demery that the Mother and children could return to the family home but that has not been repeated to me during the hearing. Moreover, the property might well not be suitable for either the Mother or Y given their respective accounts of what went on there. The Father does offer a non-harassment undertaking. Ms Papazian notes that this does not include a non-molestation clause. I am sure Ms Baker would readily get her client to agree to the latter as well but there are, I find, two problems with this. The first is that the Father does not accept that there has been any violence by him. I consider this to be a risk factor. The second is more problematic, namely his behaviour during Ms Demery's evidence in court. I am quite unable to find that he will be able to abide by any undertaking he gives me or any order of the Turkish court, given his complete inability to control himself in this court. He is clearly a very angry man who cannot regulate his emotions. I cannot therefore be satisfied that I can mitigate the risk I find established pursuant to Article 13(b). This defence is therefore also made out.

56. Finally, I turn to the question of my discretion. I am quite clear that I should not exercise my discretion to order a return to Turkey notwithstanding my findings that two of the Mother's defences are made out. In relation to settlement, Ms Papazian reminds me that there has only ever been one reported case in which a return order was made after a settlement defence was established, although there may, of course be some unreported decisions. Even in relation to the reported case, however, an opportunity was given to the Mother to ask the Polish court to give her permission to remain in this jurisdiction before the return order took effect.

57. Settlement is an area where welfare is a factor. In terms of welfare, I am entirely satisfied that there is nothing in favour of these children returning to Turkey, other than to discourage child abduction and the possibility that the children might have a better relationship with their Father if they returned. In that regard, however, I cannot ignore the allegations against him and Ms Demery's point that I would have to involve Turkish Children's Services.

Everything else points against a return. Indeed, it does so strongly. I am very concerned that a return could do significant damage to the emotional well-being of these children, particularly Y, as well as to their Mother's mental health and hence her ability to care for them, which is clearly of great importance to both of the children.

58. In terms of Article 13(b), I consider it would be wrong to require a return in circumstances where I have found that the Father is quite unable to control his emotions even in court. This gives me grave concern that he would be unable to stop himself from continuing to behave badly towards this Mother, with a consequent detrimental effect on the children. I therefore decline to exercise my discretion to order a return notwithstanding the Mother having established two defences.

59. The application is therefore dismissed. I anticipate that the Father will now make an application pursuant to Article 21 for contact. If he does so, PD12J will be engaged. Ms Demery accepts that there will need to be a full welfare assessment.

60. Finally, I am very grateful to both counsel for the very great help they have given me with this difficult case. Nothing more could possibly have been said or done on behalf of their respective clients.

Mr Justice Moor
20 December 2022