Neutral Citation Number: [2024] EWFC 356

Case No: 23222808E/LONDON/R

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2024

Before:

MR JUSTICE MACDONALD

- -

Between:

AJ	**Appellant**
- and -	
FJ	**Respondent**

- -
- -

Mr Edward Bennett (instructed by **Vardags**) for the **Appellant**
The Respondent did not appear and was not represented

Hearing date: 5 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 6 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with an appeal against the decision of the Maintenance Enforcement Business Centre (MEBC) to register a Polish interim maintenance order obtained by the respondent from the District Court in Jelenia Góra on 15 December 2022. The appellant is AJ. He is represented by Mr Bennett of counsel. The respondent is FJ. She acts in person. The appellant and respondent are the parents of two children, AJ, a boy, born in November 2009 and now aged 15, and EJ, a girl, born in December 2011 and now aged 12.

2. An appeal against registration by the MEBC lies to the Family Court pursuant to para. 2(5) of the International Recovery of Maintenance (Hague Convention 2007 etc.) Regulations 2012. In the ordinary course, appeals against registration are allocated to the magistrates. However, in this case, the grounds relied on by the appellant include public policy in the context of the treatment by the Republic of Poland of proceedings brought by the father in Poland to enforce an English prohibited steps order made in respect of the subject children, this case having been included in the infringement proceedings numbered INFR (2021) 2001 brought by the European Commission against Poland in which the Commission alleges a failure by Poland to meet its obligations under Council Regulation (EC) 2201/2003 (hereafter "BIIa"). The appellant seeks to demonstrate that registration by the MEBC of the Polish interim maintenance order was manifestly incompatible with public policy for the purposes of Art 22(a) of 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (hereafter "the 2007 Hague Convention") in circumstances where the effect of reciprocal enforcement of that order would be to finance and entrench the continuing unlawful retention of the children in the jurisdiction of Poland that results from a failure by Poland to meet its obligations under BIIa. In the circumstances, on 17 June 2024, I allocated this appeal to a judge of High Court level pursuant to r.7(2)(b) of the Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014/840) and listed the matter before myself.

3. Whilst the respondent was, in the days leading up to the appeal hearing, diligent in sending multiple representations and documents to the court by way of email and, I am satisfied, had proper notice of the appeal hearing, the respondent failed to join the remote link on the morning of the hearing. The respondent did not respond to further emails sent by the court thereafter reminding her of the hearing and providing her with a further copy of the link to access the hearing remotely. In circumstances where the respondent had had notice of the appeal hearing, was aware it was taking place, had been provided with a link to attend the hearing and had made no application for an adjournment or provided an explanation for her non-attendance, I was satisfied that it was appropriate to proceed to hear the appeal in her absence. In doing so, I have taken account of the serial representations she has made to the court in writing.

4. In determining this appeal, I have had the benefit of reading the appeal bundle and supplementary bundle, which includes the documentation from the relevant Polish proceedings, the comprehensive Skeleton Argument prepared by Mr Bennett on behalf of the appellant and a bundle of authorities. As I have noted, I have also taken account, where appropriate, of the matters set out in the correspondence sent to the

court by the respondent. Certain additional documents were provided during the hearing, to which I shall refer below. In light of the issues raised by this appeal, I reserved judgment and now set out my decision and reasons.

BACKGROUND AND EVIDENCE

5. The respondent was born in Poland in 1978. The appellant was born in England in 1981. The parties married in Poland on 23 August 2008 and thereafter lived in England where, as I have noted, they had two children. The parties separated in April 2014. Since that date, the parties have been involved in extended litigation. Whilst this appeal concerns the question of reciprocal enforcement of child maintenance, given the manner in which the appellant advances aspects of his appeal against registration, before considering the maintenance proceedings it is necessary to begin with an account of the proceedings taken in relation to the care of the children in this jurisdiction and in the jurisdiction of Poland.

6. Following the parents' separation, the respondent made a number of allegations of domestic abuse against the appellant and reported these allegations to the police. As a result, the appellant was charged with assault. A trial took place on 28 July 2014 at Uxbridge Magistrates' Court, at which the charge against the appellant was dismissed. The magistrates further found that 'there were inconsistencies in the evidence of [the respondent]' and found '[the appellant] to be a credible witness'. The appellant was awarded his costs.

7. In relation to the same allegations of domestic abuse, the respondent also applied without notice for a non-molestation order against the appellant under the Family Law Act 1996. On 2 May 2014, District Judge Wicks (as he then was) made a non-molestation order to expire on 31 October 2014. At the on notice return hearing, the appellant made counter-allegations against the respondent. It would appear that the proceedings under the Family Law Act 1996 were concluded on 1 August 2014. The bundle contains a copy of undertakings given by the appellant on that date not to use or threaten violence against the respondent, to expire on 31 January 2015. The appellant asserts that no findings were made against him and that he made no admissions. However, the order made on 1 August 2014, and referred to in the General Form of Undertaking, is not before this court and Mr Bennett informs the court that the appellant has not been able to locate a copy of the same.

8. On 9 May 2014, the appellant issued private law proceedings in this jurisdiction, seeking a child arrangements order and a prohibited steps order preventing the respondent from removing the children from the jurisdiction. Notably, the respondent's allegations of domestic abuse played no part in these proceedings. In the private law proceedings, an interim child arrangements order was agreed between the parties following a hearing on 16 May 2014. District Judge Wicks made a final child arrangements order on 1 August 2014. On 16 December 2014, the appellant applied for enforcement of the child arrangements order in circumstances where the mother repeatedly obstructed the contact ordered by the court. On 6 March 2015, District Judge Drew amended the child arrangements order to provide for handovers at school to minimise the possibility of obstruction by the mother.

9. On 23 March 2015, the respondent applied for permission to remove the children permanently to the jurisdiction of Poland. In July 2015, the respondent made an

allegation of child sexual abuse against the appellant's brother. Following a short investigation, the police took no further action, considering the respondent's allegation to be groundless. The respondent's allegation of sexual abuse caused children's services to become involved. The local authority prepared two reports in August and October 2015. Those reports raised no concerns regarding the children's welfare. The report prepared by the Cafcass Family Court Adviser (FCA) pursuant to s. 7 of the Children Act 1989 was received on 4 September 2015 and recommended that the respondent's application for leave to remove the children permanently from the jurisdiction be refused.

10. The hearing concerning the respondent's application for leave to remove took place on 10 November 2015. In light of the FCA's report, the respondent withdrew her application for leave to remove the children permanently from the jurisdiction of England and Wales and issued an application to vary the child arrangements order so as to reduce the time the children spent with the appellant. On 22 August 2016, the respondent applied for a prohibited steps order. That application was dismissed on 9 September 2016 and an award of costs made in favour of the appellant. The final hearing for the respondent's application to vary the child arrangements order took place on 13 and 14 October 2016. The court made a final order increasing the appellant's time with the children. That order provided for the children to live with the respondent and spend time with the appellant on alternate weekends, mid-week and during school holidays. In addition to the child arrangements order, the court made a prohibited steps order in relation to the appellant's brother. The appellant appealed that part of the order but that appeal was dismissed on 4 January 2017. The appeal judgment clarified that the prohibited steps order was not connected to the past allegations of the respondent, which had been dismissed.

11. On 14 October 2017, the appellant met his present wife, with whom he now has two children. On 30 November 2017, the respondent made a further application for permission to remove the children permanently to the jurisdiction of Poland. Two reports were filed and served by the FCA with respect to that application, on 16 April 2018 and 5 June 2018 respectively. The report dated 16 April 2018 report recommended "that the Court dismiss [the respondent's] application" and the report dated 5 June 2018 concluded that "[the respondent's] insistence on exposing the children to only the positives of living in Poland is damaging for the children… if the children do relocate Poland (*sic*), this negative view of the UK could translate to their relationship with their father". The FCA report of 5 June 2018 recommended that the court order a shared care arrangement to ensure the children had an equal relationship with both parents.

12. The final hearing of the respondent's second application for permission to remove the children permanently from the jurisdiction took place from 23 to 25 July 2018, before His Honour Judge Willans. Judgment was delivered on 15 August 2018. In his judgment, HHJ Willans found the respondent was unwilling to engage with questions where she perceived that to answer the question would undermine her position and was unwilling to do her best to assist the court by answering reasonable questions put to her. He considered the appellant to be a far more helpful witness. The respondent's application was refused. HHJ Willans held at [89] of his judgment that:

> "Much as they would gain from Poland and with full respect to the practical realities of such a move I simply do not think that it would be consistent

> with the overall wellbeing. I consider it is very likely to be associated with a diminishing in the role of [the appellant] and in my assessment, this is on balance a relationship of greater importance to them than their multi-faceted connections to Poland".

13. On 15 August 2018, HHJ Willans made a child arrangements order providing for a shared care arrangement as between the appellant and the respondent. He also made a specific issue order which required, *inter alia*, the mother to return the children to England and Wales at the conclusion of any holiday or overseas visit spent outside England and Wales. As I will come to, that specific issue order mistakenly omitted the words "the children" from its terms. HHJ Willans also made a prohibited steps order prohibiting the mother from causing or permitting either child to attend any appointment with a child psychologist without the written permission of the appellant or an order of the court. A period without litigation followed from 2018 to 2021.

14. On 1 April 2021, the respondent removed the children to Poland without notice to the appellant. The children have remained in the jurisdiction of Poland since that date. On 15 April 2021, the respondent wrote to the appellant and informed him that, in breach of the specific issue order of HHJ Willans, she and the children would not be returning to England and that the children would be undergoing psychological assessments in Poland, again in breach of the order made by HHJ Willans. The respondent had previously asserted that she initially planned the trip to Poland for a holiday during the Easter break, however, she later became unable to return to England because of the need for specialist psychiatric assistance for the children. In response to the respondent removing the children from the jurisdiction of England and Wales, the appellant commenced proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter "the 1980 Hague Convention") for the return of the children. That application was transmitted to the Central Authority in Poland on 19 April 2021.

15. On 22 April 2021, the appellant also issued proceedings in this jurisdiction seeking the return of the children. Thereafter, the proceedings under the Children Act 1989 were stayed, pending the outcome of proceedings in Poland under the 1980 Hague Convention. Save for two brief occasions during an assessment by the Polish equivalent of Cafcass (the OZSS), the father has not seen the children since 25 March 2021.

16. Following the removal of the children from the jurisdiction, the appellant informed the Child Maintenance Service (CMS) that the children had been taken to Poland by the respondent and on 30 April 2021 was advised by CMS to suspend payments to the respondent.

17. The first hearing of the 1980 Hague Convention proceedings in Poland took place on 28 June 2021. A report from the OZSS dated 15 July 2021 recommended that the children be returned to the jurisdiction of England and Wales and, beforehand, that they have a short holiday with the appellant pending the conclusion of the proceedings. At a hearing on 16 July 2021, the Polish court made an order providing for the appellant to take the children on holiday, commencing 18 July 2018. The respondent prevented the father from collecting the children for the holiday ordered by the Polish court. On 20 July 2021, the Polish court made an order under Art 12 of the 1980 Hague Convention requiring the children to be returned to the jurisdiction of

England and Wales. On 21 July 2021, following the making of the return order by the Polish Court, the respondent absconded with the children.

18. The order of the Polish judge of 20 July 2021 requiring the return of the children to the jurisdiction of England and Wales recorded that "The Regional Prosecutor in Wroclaw stated that he did not oppose the request to return the minors to the UK". However, two weeks later on 3 August 2021 the Regional Prosecutor reversed that position and filed an appeal against the return order. On 18 August 2021, the respondent filed her own appeal against the return order. The mother's appeal was supported by a letter, dated 2 September 2021, from the Polish Child Ombudsman. On 20 October 2021, the Polish Court of Appeal allowed the mother's appeal and dismissed the application for the return of the children to the jurisdiction of England and Wales. In these proceedings, the appellant relies on a tweet subsequently posted on Twitter (now X) by the then Polish Deputy Justice Minister offering thanks to the then Justice Minister in connection with the decision of the Polish Court of Appeal:

> "Two children who were to be released to the UK will remain in Poland. This was the decision of SA Warsaw, changing the ruling of the first instance. I thank the judges and especially the prosecutors. Thank you [Zbigniew Ziobro] The children sang back by phone: thank you. They remain."

19. In October 2021, the appellant informally requested that the respondent facilitate contact between himself and the children. The respondent refused that request. On 23 November 2021, and without notice to the appellant, the respondent applied to the Polish court for an order terminating the father's parental responsibility. In seeking that order, the respondent relied on what she asserted was the father's violence towards her and his alleged behaviour towards the children comprising shouting, threatening them, limiting their food and using physical violence against them. Those allegations remain denied by the appellant.

20. On 1 December 2021, the appellant applied under the slip rule to amend the prohibited steps order of HHJ Willans dated 15 August 2018. On 18 January 2022, HHJ Willans amended the order of 15 August 2018 to correct the wording of that part of the prohibited steps order requiring the return of the children to the jurisdiction of England and Wales at the conclusion of any holiday period or overseas visit, the original order having omitted the words "the children". A copy of that order was certified on 28 January 2022 and the appellant applied to the District Court in Poland on 11 March 2022 to enforce the amended prohibited steps order under Art 42 of BIIa, which was then in force between the jurisdictions of England and Wales and Poland.

21. On 2 June 2022, the District Court in Poland granted the application for enforcement under Art 42 of BIIa, requiring the children to be returned to the jurisdiction of England and Wales. Whilst that order was made without notice to the respondent, the respondent was alerted to the making of the order, withdrew the children from school on 3 June 2022 and went into hiding. At this hearing, the appellant asserts that the respondent was alerted to the order by contacts in the local court system and the Polish Ministry of Justice. In an email sent to the English court on 9 January 2023, the mother says of this period:

> "I have not thought that I would find myself in such a position where I would have to hide holding my children and move from one household to another relying on people's goodwill to shelter us. This was our reality between 2nd of June and 29th of September when the father involved private detectives and police looking for us and visiting the household of every single member of my family and telling the police in Poland that the "return order" from England must be executed here."

22. Whilst the appellant applied to the Polish court for practical steps to be taken to locate the respondent and children, this application was not processed by the Polish court. On 6 July 2022, a letter from the Polish Public Prosecutor announced his decision not to investigate the location of the children. On 4 June 2022, the respondent applied to the District Court for non-recognition of the amended English prohibited steps order. On 1 July 2022, the Polish Public Prosecutor wrote to the District Court supporting the respondent's application for non-recognition of the return order. The Polish Child Ombudsman also wrote to the District Court in support of the respondent's application.

23. On 22 September 2022, the District Court issued an interim order granting the respondent's application for non-recognition of the amended prohibited steps order. That decision appears to have been based in part on the conclusion by the District Court that the departure of the United Kingdom from the European Union terminated the application of BIIa to the proceedings. *Prima facie*, that conclusion is not consistent with the terms of Art 67 of the EU Withdrawal Agreement, although the respondent appears to have argued, and the District Court accepted, that the amendment of the English prohibited steps order under the slip rule on 18 January 2022 did not amount to a continuation of earlier proceedings and thus was not caught by the transitional provisions set out in the EU Withdrawal Agreement. The District Court further relied on the fact that the English court had not heard from the children or the respondent before amending the prohibited steps order, which the District Court considered justified the refusal to recognise the order under Art 23(2)(b) and (c) of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereafter the 1996 Hague Convention). On 2 November 2022, the appellant lodged an appeal against the non-recognition of the prohibited steps order. In these appeal proceedings, the appellant relies on a tweet placed on Twitter (now X) by the Polish Child Ombudsman following the decision of 22 September 2022 celebrating the non-recognition of the English prohibited steps order:

> "The District Court is Jelenia Góra supported my position and did not recognise the judgment of the British court on the extradition of the children from Poland. [The children] stay with us. The British did not notify their mother about the hearing, did not listen to the children and invoked EU law, even though they had already left the EU."

24. On 21 November 2022, the Vice Consul of the Polish Embassy in London wrote to the English family court complaining that the appellant had sought to rely in Poland on the amended prohibited steps order dated 15 August 2018, expressing concern that the appellant was continuing to litigate in Poland, seeking confirmation that the "English courts accept the judgment made by the Polish Court of Appeal under the

1980 Hague Convention", and seeking an order under s.91(14) of the Children Act 1989:

> "We are very concerned that the children's father is acting to the children's detriment by renewing applications in Polish courts and providing documentation which does not reflect the true position. To put a stop to further applications by [the appellant], we would be most grateful if the court could confirm if under the court's own motion an order can be issued preventing [the appellant] from making any further applications in this respect. An order under s.91(14) of the Children's (*sic*) Act 1989 would prevent [the appellant] from making further applications without permission of the court."

25. In advancing his appeal, the appellant contends that this communication by the Polish Embassy seeking for the English court to make an order against a British national (which, concerningly, resulted in the family court sitting at Barnet listing a hearing in response to the communication from the Polish Embassy but, it would appear, absent any application made in accordance with the rules of court) was in clear breach of consular convention. The bundle for this hearing contains a letter from the Secretary of State for Foreign, Commonwealth and Development Affairs dated 29 June 2023, written in response to concerns raised on the appellant's behalf, which makes clear that the FCDO made representations to the Polish Embassy regarding its communication with the family court on 21 November 2022. In this context, the appellant further relies on a letter from the Consul General at the Polish Embassy dated 25 November 2022, written in response to the appellant's complaint of political interference in the proceedings in Poland. In that letter, the Embassy sets out a position that appears in direct contradiction to the approach it had made to the English family court four days earlier on 21 November 2022:

> "It must be emphasised that the Consular Section of the Embassy of the Republic of Poland acts only within the scope of the relevant Polish and international regulations. These are inter alia respectively: the Polish Act on Consular Law 2015, the Vienna Convention on Consular Relations 1963 and the Consular Convention between the Republic of Poland and the United Kingdom of Great Britain and Northern Ireland 1967. In legal proceedings, the Consular Section of the Embassy of the Republic of Poland is bounded (*sic*) by the above mentioned regulations, therefor, is unable to exercise the rights reserved strictly for the parties. The Consular Section of the Embassy of the Republic of Poland may not represent the party nor act in the name of and on behalf of individual or the Polish State. Consequently, please be informed that regrettably the Consular Section of the Embassy of the Republic of Poland is not entitled to present its position in relation to this proceedings (*sic*) as this is outside the scope of consular functions. Moreover, our competencies are limited in all Private Law cases."

26. On 26 January 2023, the European Commission launched infringement proceedings against Poland in the European Court of Justice asserting a failure by Poland in abduction cases to fulfil its obligations under BIIa. Those proceedings remain ongoing and the United Kingdom registered its interest in the infringement proceedings on 24 May 2023. As I have noted, this case was one of those cited by the

European Commission as evidencing the failure by Poland to honour its obligations under BIIa. On 10 February 2023, the European Commission Directorate-General Justice and Consumers wrote to the appellant informing him that:

> "The case of your children [AJ] and [EJ] was also referred to in the letter sent to Poland as an example of the cases illustrating failure by Poland to recognise judgments issued by the court of another Member State pursuant to Article 11(8) of the Brussels IIa Regulation and certified in accordance with Article 42 of the Regulation, in violation of Articles 11(8) and 42(1) of the Regulation and to enforce such judgments, in violation of Article 47(2) of the Regulation."

27. The appellant's appeal against non-recognition of the English prohibited steps order was dismissed by the Court of Appeal in Wroclaw on 24 April 2023. On 29 June 2023, the appellant lodged a cassation appeal with the Polish Supreme Court against the order for non-recognition. On 25 April 2024, the Supreme Court accepted the cassation appeal for full examination by a Supreme Court panel. The Supreme Court hearing was listed for 18 September 2024 but that hearing did not proceed. There is currently no date for the Supreme Court hearing of the cassation appeal.

28. Returning to the chronology with respect to proceedings concerning the children, the appellant contends that he was not served with the application for an order terminating his parental responsibility until 4 August 2023. The appellant contested the application on the grounds that Poland lacked jurisdiction in respect of the children. The appellant's contention that the Polish court lacked jurisdiction in respect of the children was rejected by the Regional Court. On 29 January 2024, the District Court made an interim order limiting the appellant's parental responsibility on the grounds that he resided outside the jurisdiction of Poland. The appellant has appealed both the decision that the District Court had jurisdiction in respect of the children and the interim order made on 29 January 2024.

29. On 4 September 2024, the OZSS undertook an assessment of the children and thereafter produced a report dated 25 September 2024. The OZSS assessment reported that the children's relationship with the appellant was "significantly disturbed" and that the children's attitudes towards the appellant resulted primarily from their identification with the respondent on whom they remain dependent, whereas there was no basis for concluding that the behaviour of the appellant father had influenced the hostility displayed by the children. Moreover the OZSS found evidence of "several years of efforts to minimise the [appellant's] involvement in the children's lives, which bears the hallmarks of parental alienation" and the respondent's "tendency to depreciate, also indirectly, the person of [the appellant's] in the eyes of minors, also in the form of nurturing memories of negative past events", the OZSS report concluded that "a progressive process of disruption of the parent-child bond is observable, which is expressed in the increasing distance of the minors from [the appellant]… which results from the consolidation of the existing phenomenon of parental alienation".

30. On 6 September 2024, the Regional Court found that the respondent exercised her parental authority in a proper way and the children were generally well cared for, except for "limitations" regarding *inter alia* "remaining in conflict ... parental alienation ... lack of full insight into their emotional needs". The children did not

want to have contact with the appellant at present and the children's attitudes towards the appellant were a direct result of the respondent's negative attitude towards the appellant. The proceedings in Poland relating to parental responsibility are ongoing.

31. Within the foregoing context of proceedings in respect of the children, the respondent has also pursued proceedings for financial relief, including the application in the Polish court for child maintenance that resulted in the registration that is the subject of this appeal. The salient parts of the chronology as it relates to the maintenance proceedings are as follows, beginning with the financial remedy application made by the respondent in this jurisdiction.

32. On 7 May 2014, the respondent issued divorce proceedings in this jurisdiction. Decree Nisi was granted on 25 July 2014. The certificate of entitlement to a decree, dated 7 July 2014, records that the respondent was entitled to a 'decree of divorce on the grounds that the marriage has irretrievably broken down, the facts found proved being [the appellant's] unreasonable behaviour'. The appellant asserts that, as with many other sets of divorce proceedings in the days preceding no-fault divorce, this phraseology was necessary to facilitate the divorce and did not amount to an admission of wrongdoing.

33. The respondent applied for financial remedy on 5 September 2015. The appellant had made an open offer to the respondent on 25 June 2015 in which he offered, *inter alia*, to continue paying the mortgage on the matrimonial home until 2024. The respondent rejected this offer. The first directions appointment in the financial remedy proceedings took place on 18 December 2015. An ineffective FDR took place on 22 April 2016 and the respondent's application was listed for final hearing on 26 April 2017. On that date, District Judge Mendel made a final order and granted Decree Absolute. The appellant undertook to continue paying the mortgage on the former matrimonial home and the following recitals and orders were approved:

> "**Recitals**
>
> **8. Introductory Recital**
>
> The parties agree that the terms set out in this order are accepted in full and final satisfaction of:
>
> .../
>
> (g) All other claims of any nature which one may have against the other as a result of their marriage howsoever arising either in England and Wales or in any other jurisdiction.
>
> .../
>
> **Agreements / Declarations**
>
> .../
>
> 13. The [appellant] will continue to make payments in relation to the children as provided from time to time by the CMS or under a CMS calculation, or at the rate which would be applied under a CMS calculation.

.../

IT IS ORDERED THAT (with effect from Decree Absolute)

.../

15. Deferred order for sale

The family home [as in definition above] shall be placed on the open market for sale, and subsequently sold on the first to occur of:

i) 31 August 2024;

ii) the remarriage of the [respondent]; or

iii) the [respondent] becoming economically dependent upon another man for a period in excess of six months

iv) a further order of the court.

16. Nominal periodical payments order in favour of the applicant with an extendable term

The [appellant] shall pay to the [respondent] maintenance pending suit until the date of decree absolute and afterwards periodical payments. Payments shall be at the rate of 5 pence per annum. Payments shall commence forthwith end on the first to occur of:

i) the death of either the [respondent] or the [appellant];

ii) the [respondent's] remarriage;

iii) the youngest surviving child of the family attaining the age of 18, after which the [respondent's] claims for periodical payments and secured periodical payments shall be dismissed, and it is directed that upon the expiry of the term:

a) the [respondent] shall not be entitled to make any further application in relation to the marriage for an order under the Matrimonial Causes Act 1973 section 23(1)(a) or (b) for periodical payments or secured periodical payments; and

b) the [respondent] shall not be entitled on the [appellant's] death to apply for an order under the Inheritance (Provision for Family and Dependants) Act 1975, section 2.

However, the [respondent] may apply for an order to extend this term, provided the application is made before the term expires.

iv) a further order.

17. Clean break for the [respondent]: capital

> Except as provided for in this order, the [respondent's] claims for lump sum orders, property adjustment orders, pension sharing orders and pension attachment orders shall be dismissed.
>
> **18. Clean break for the [appellant]: capital and income**
>
> Except as provided for in this order, the [appellant's] claims for periodical payment orders, secured periodical payment orders, lump sum orders, property adjustment orders, pension sharing orders and pension attachment orders shall be dismissed, and the [appellant] shall not be entitled to make any further application in relation to this marriage for an order under the Matrimonial Causes Act 1973 section 23(1)(a) or (b) and neither shall he be entitled on the death of the other to apply for an order under the Inheritance (Provision for Family and Dependants) Act 1975, section 2."

34. The appellant contends that the arrangements set out in the final order in the financial remedy proceedings were informed by the dismissal of the respondent's application for permission to remove the children permanently to the jurisdiction of Poland, the financial remedy proceedings having been adjourned to await the outcome of the proceedings under the Children Act 1989.

35. On 27 December 2021, the respondent issued proceedings in the District Court in Poland for child maintenance. Attached to the respondent's pleadings were an extensive number of supporting documents. The appellant asserts that he was not served with the papers in the Polish maintenance proceedings until 16 June 2022. On 3 January 2022, the District Court made an interim maintenance order requiring the appellant to make child maintenance payments amounting to PLN 1500 per month per child, PLN 3000 per month total, to the respondent for the children in Poland. The appellant contends that he was not served with the interim maintenance order until 16 June 2022.

36. On 30 June 2022 the appellant's lawyers in Poland submitted to the District Court that the Polish court lacked jurisdiction in respect of child maintenance. On 21 September 2022, the District Court accepted those submissions, set aside the interim child maintenance order dated 3 January 2022 and dismissed the respondent's claim for child maintenance for want of jurisdiction. In doing so, the District Court held that:

> "...the minors, in accordance with the decision of the Barnet Family Court of 15 August 2018, have their place of residence and domicile in the territory of the United Kingdom which, having regard to the provisions of Art. 1103 of the Code of Civil Procedure and Art. 11033 of the Code of Civil Procedure, leads to the conclusion that the Polish court has no jurisdiction to resolve the present case."

37. On 11 October 2022, the Polish Public Prosecutor appealed to the Regional Court against the dismissal of the respondent's application for child maintenance, submitting that the District Court had erred in finding that the children were not domiciled in Poland. The Polish Public Prosecutor submitted that the jurisdiction of the Polish courts should be established on the basis of the provisions of the Polish Code of Civil Procedure and that the "concept of 'habitual residence of the child'… is a concept which refers to the factual situation of the child, irrespective of its legal

regulation by administrative decisions or court judgments". On 23 October 2022, the respondent also appealed against the dismissal of her application for child maintenance, arguing that the children were domiciled in Poland and there was therefore no jurisdiction issue. Lawyers acting on behalf of the appellant responded on 22 November 2022, submitting that the domicile of the children was the United Kingdom and that the court in Poland was bound by the decision of the family court sitting at Barnet.

38. On 29 November 2022, the District Court suspended the substantive Polish maintenance proceedings pending the non-recognition proceedings in relation to the English return order detailed above. However, on 4 December 2022 the respondent applied to the Regional Court (which was seised of the appeals by the Public Prosecutor and the respondent against the dismissal by the District Court for want of jurisdiction of the maintenance proceedings) for interim child maintenance. That application was lodged with the Regional Court on 7 December 2022. A letter from the appellant's Polish lawyer, Professor Jacek Wierciński, filed and served in these proceedings dated 31 October 2024 states that the application for an interim maintenance order was made within the maintenance proceedings issued by the respondent on 27 December 2021. On 15 December 2022, the Regional Court made a without notice interim child maintenance order in favour of the respondent. The appellant was ordered to pay the respondent PLN 3,000 each month, PLN 1,500 for each child, commencing on 7 December 2022. It is the registration of the Polish interim maintenance order of 15 December 2022 that is the subject of this appeal.

39. On 19 December 2022, a copy of the interim maintenance order was served on the District Prosecutor by the Polish court. The document, entitled "Service of a copy of the decision" included the following words: "Instruction: the decision is not subject to an appeal". On the same day, a copy of the interim maintenance order was also served on the appellant's lawyer. That copy of the interim order did *not* include the instruction regarding non-appealability endorsed on the copy sent to the Public Prosecutor. A copy of the interim maintenance order was not served on the appellant's Polish lawyer until 9 January 2023. On 10 January 2023, the appellant's Polish lawyer applied to the District Court for written reasons for granting the interim maintenance order. That request was rejected by the court on 17 January 2023. This was on the basis that the interim maintenance order was not, under the law that then applied, appealable. On the same day, the respondent emailed the appellant to inform him that he would be prosecuted under criminal law in Poland if he refused to pay the child maintenance.

40. The Polish authorities filed a Statement of Proper Notice for the purposes of Art25(1)(c) of the 2007 Hague Convention on 30 January 2023. The box on the Proper Notice labelled "The respondent had proper notice of the proceedings and an opportunity to be heard" was left unchecked. By contrast to the document served on the District Prosecutor on 19 January 2023, the box on the Proper Notice labelled "The respondent had proper notice of the decision and an opportunity to challenge or appeal it on fact and law" *was* checked. The appellant asserts that there was, in fact, no opportunity for either himself or his Polish lawyer to challenge or appeal the interim maintenance order, relying on the refusal by the Polish court on 17 January 2023 to provide reasons, the law in force at the time rendering interim maintenance

orders unappealable and the document served on the District Prosecutor on 19 January 2023.

41. On 19 May 2023, an officer of the MEBC registered the Polish interim maintenance order. On 3 June 2023 the appellant indicated that he disputed reciprocal enforcement of maintenance. On 22 September 2023, the magistrates determined that the matter was sufficiently complex to be heard by a Judge and adjourned the matter accordingly. As I have noted, on 17 June 2024 I allocated this appeal to a judge of High Court level pursuant to r.7(2)(b) of the Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014/840) and listed the matter before myself. The delay that has attended this matter is regrettable in circumstances where Art 23(11) of the 2007 Hague Convention requires a competent authority taking any decision on recognition and enforcement, including any appeal, to act expeditiously in circumstances where the underlying obligation comprises or includes maintenance intended to meet current needs.

42. On 25 May 2023 the District Court in Poland reinstated the suspended maintenance proceedings. The appellant lodged further evidence seeking to demonstrate a change of circumstances following the birth of a child by his current wife. On 22 July 2024, the District Court ordered the appellant to pay PLN 2000 per month for each child, PLN 4000 total, dismissed the remainder of the respondent's claim and made an order for costs against the appellant. In giving judgment, the District Court held that, in circumstances where the respondent's maintenance application was issued on 27 December 2021 (after the end of the transitional period following the withdrawal of the United Kingdom from the European Union) and thus the jurisdictional rules in BIIa were not applicable, where the 2007 Hague Convention contained no rules of jurisdiction and where, accordingly, the Polish court had to look to domestic law to determine the question of jurisdiction, the Polish court had jurisdiction based on the habitual residence of the children in Poland (as the creditors of maintenance) pursuant to the Polish Civil Procedure Code Art. 1103. The father appealed the 22 July 2024 order on 6 September 2024 and the mother also appealed on 17 September 2024. Both those appeals are pending. There has been no application to the MEBC to register the order made on 22 July 2024.

SUBMISSIONS

43. In summary, the appellant relies on the following submissions with respect to his appeal against the registration for reciprocal enforcement of maintenance of the interim maintenance order dated 15 December 2022:

    i) None of the alternate bases for recognition of the maintenance order dated 15 December 2022 set out in Art 20 of the 2007 Hague Convention are made out in circumstances where:

        a) At all material times the appellant has been habitually resident in the jurisdiction of England and Wales for the purposes of Art 20(1)(a) of the 2007 Hague Convention.

        b) The appellant has not submitted to the substantive maintenance jurisdiction of the Polish court, and challenged it at the first opportunity

following service on 16 June 2022 of the application, for the purposes of Art 22(1)(b).

c) The creditor (either the respondent or the children) was not habitually resident in the jurisdiction of Poland at the time the Polish maintenance proceedings were instituted on 27 December 2021 for the purposes of Art 22(1)(c).

d) The appellant has never resided with the children in Poland or resided in Poland and provided support for the children in Poland for the purposes of Art 22(1)(d).

e) The dispute between the parties relates solely to maintenance obligations in respect of the children for the purposes of Art 22(1)(e).

f) The decision taken by the Polish court with respect to child maintenance was taken in proceedings solely concerned with child maintenance and not with either personal status or parental responsibility for the purposes of Art 20(1)(f).

ii) The grounds for refusal of recognition set out in Art 22 of the 2007 Hague Convention are made out in in circumstances where:

a) The recognition and enforcement of the decision of the Polish Court on 15 December 2022 is manifestly incompatible with the public policy of the United Kingdom for the purposes of Art 22(a) of the 2007 Hague Convention.

b) The decision of the Polish court was obtained by fraud in connection with a matter of procedure for the purposes of Art 22(b) of the 2007 Hague Convention.

c) In circumstances where the respondent applied without notice for an interim maintenance order, the appellant neither appeared nor was represented in proceedings before the District Court for an interim maintenance order when the law of Poland provides for notice of proceedings and the appellant did not have proper notice and an opportunity to be heard and, in any event, the appellant did not have proper notice of the decision and an opportunity to challenge or appeal it on fact or law, for the purposes of Art 22(e) of the 2007 Hague Convention.

44. With respect to the appellant's submission that none of the bases under Art 20 for recognition are made out, it is necessary to consider the submissions in respect of one of those bases in a little more detail.

45. The appellant submits that the basis for recognition under Art 20(1)(c) is not made out in this case. On behalf of the appellant, Mr Bennett submits that Art 20(1)(c) makes clear that the date for determining whether the creditor was habitually resident in the State of origin is the date the maintenance proceedings were instituted, in this case 27 December 2021. Mr Bennett further relies on paragraph 452-3 of the Explanatory

Report for the 2007 Hague Convention by Alegría Borrás and Jennifer Degeling, which states that the basis for recognition provided by Art 20(1)(c) and the factual elements underpinning it "have to be assessed at the time when the proceedings were instituted, without taking into account any possible change thereafter", pointing out that neither the United Kingdom nor the Republic of Poland has entered a reservation with respect to Art 20(1)(c). In so far as the Practical Handbook for the 2007 Hague Convention refers at paragraph 1144 to habitual residence at the time the maintenance decision was made, Mr Bennett submits that this must be a mistake having regard to the express terms of Art 20(1)(c) (noting also that the English courts have felt able in other cases to be constructively critical of HCCH Practical Handbooks, for example in *Re J (A Child)* [2015] UKSC per Baroness Hale at [38]-[39]).

46. The appellant concentrates in his evidence, and Mr Bennett concentrated his submissions, on demonstrating that the respondent was not, as the creditor, habitually resident in the jurisdiction of Poland for the purposes of Art 20(1)(c) at the time the maintenance application was made on 27 December 2021. In particular, he relies on the respondent being "wholly integrated in life in England" prior to her abduction of the children on 1 April 2021, the respondent's continuing financial arrangements in England as at December 2021 (evidenced by her borrowing £25,000 on 6 April 2021 by way of a facility only available to UK residents; her continuing to claim benefits in England by way of child tax credits until August 2021 and child benefit until October 2021; her receipt of an HMRC Self-Employment Income Support Grant on 4 May 2021 that required a declaration that the grantee intended to continue to carry on trade in the tax year 2021 to 2022; a payment made by the respondent to the Disclosure and Barring Service (DBS) on 26 October 2021 for renewal of her DBS clearance for 12 months; the maintenance by the respondent of a UK mobile phone throughout the period, including a payment on 16 December 2021; and the respondent continuing to seek payment of child maintenance via the CMS for the period June 2021 to April 2022). The appellant further relies on the fact that the order made in the financial remedy proceedings expressly preserved the former matrimonial home for the respondent and the children until August 2024, in which many of the respondent's possessions remain.

47. The appellant seeks to contrast the foregoing position with what he contends was the respondent's unsettled position in Poland from 1 April 2021, during which time she was residing with the maternal grandmother, and at times moving from property to property in order to avoid the enforcement of court orders (as evidenced by the respondent's email detailed above). Within this context, Mr Bennett submits that the respondent cannot, as creditor, be said to have been habitually resident in Poland as at 27 December 2021 for the purposes of Art 20(1)(c).

48. Whilst the appellant concentrates in his evidence, and Mr Bennett concentrated his submissions, on demonstrating that the respondent was not, as the creditor, habitually resident in the jurisdiction of Poland for the purposes of Art 20(1)(c), it would appear that the Polish courts treated the children as applicants for maintenance provision. This can be seen from the decision of the District Court on 21 September 2021 in which the court made clear the case "for alimony" was brought by the children. It was in this context that the District Court determined on 21 September 2021 that the children's habitual residence was in England and that the Polish court had no jurisdiction with respect to maintenance.

49. In acknowledging that it may be necessary for the court to consider the habitual residence of the children when examining whether the basis for recognition under Art 20(1)(c) is made out in this case, Mr Bennett submits that the children likewise were not habitually resident in the jurisdiction of Poland as at 27 December 2021 for the purposes of Art 20(1)(c) of the 2007 Hague Convention in the context of their having been abducted from the jurisdiction of England and Wales on 1 April 2021. Mr Bennett relies on the child arrangements order made by the English court in 2018, the disrupted nature of the children's stay in Poland up to 27 December 2021 the fact that the children's belongings remained in England and that they remained on the school rolls in this jurisdiction.

50. With respect to the appellant's submissions that the grounds for refusal of recognition under Art 22 are made out, once again it is necessary to consider some of those the submissions in a little more detail.

51. Within the context of the treatment by Poland of the appellant's application to enforce an English prohibited steps order made in respect of the subject children under BIIa, Mr Bennett submits that it would be manifestly incompatible with the public policy of the United Kingdom for the purposes of Art 22(a) of the 2007 Hague Convention to recognise the maintenance order made by the District Court on 15 December 2022. Mr Bennett advances his submissions under Art 22(a) in two ways.

52. First, having regard to the approach of the State of Poland to the appellant's attempts to enforce his prohibited steps order under BIIa, Mr Bennett submits that the effect of reciprocal enforcement of that order would be to finance and entrench the continuing unlawful retention of the children in the jurisdiction of Poland that is the result of a failure by Poland to meet its obligations under BIIa in the manner summarised above (characterised by the appellant as political interference in, and mishandling of, the Polish proceedings during the currency of the previous Polish administration). Mr Bennett relies on the fact that this position has resulted in the infringement proceedings brought by the European Commission. Within this context, Mr Bennett contends that recognition would be manifestly incompatible with the public policy in this jurisdiction of ensuring the maintenance of the rule of law.

53. Second, Mr Bennett submits that in the context of a deliberate child abduction or retention it would in any event by contrary to public policy for the purposes of Art 22(a) to permit reciprocal enforcement of a maintenance order where this would perpetuate the harm to the child consequent upon that conduct. Mr Bennett submits that the 2007 Hague Convention, along with the 1980, 1996 and 1993 Hague Conventions, is a child protection treaty in that it is designed to enhance and further the best interests of children, and that the 2007 Hague Convention, along with those other treaties, was not intended to be used to facilitate harm to children. Mr Bennett further submits that the most recent psychological report prepared for the Polish proceedings evidences that the children are suffering harm in the care of the respondent due to her alienating behaviour. He further contends that this court can have regard to that evidence without being held to have reviewed the merits of the maintenance decision contrary to Art 28 of the 2007 Hague Convention. Mr Bennett submits that it is English public policy not to make, or to give effect to, decisions that would cause or perpetuate harm to children, which would be the effect of the reciprocal enforcement of the Polish maintenance order by enabling the respondent to perpetuate the alienating behaviour identified in the psychological report, in the

context of which the Polish court has yet to undertake a welfare analysis. Within this context, Mr Bennett contends that recognition would be manifestly incompatible with the public policy in this jurisdiction independent of the position taken by the State of Poland with respect to its obligations under BIIa.

54. In seeking to make good the submission that the decision of the Polish court was obtained by fraud in connection with a matter of procedure for the purposes of Art 22(b) of the 2007 Hague Convention, Mr Bennett prays in aid what he submits are clear examples of the respondent actively misrepresenting matters to the District Court in December 2022. These include implying that the children had only been temporarily in England, asserting that the appellant was not involved with the children's lives, alleging that the appellant had bribed Cafcass and court staff, stating that the Certificate of Entitlement to a Decree was in fact a certificate of divorce and representing the term "unreasonable behaviour" as meaning the divorce had been granted based on the sole fault of the appellant (which had substantial procedural consequences for maintenance proceedings in Poland in circumstances where sole fault cases are dealt with differently under Art 60 of the Polish Family and Guardianship Code) and claiming the non-molestation order was probative of an assertion that the appellant "used violence towards his family" and distorted the position as to whether mediation was possible, in circumstances where the Polish process requires mediation where it is possible.

55. Mr Bennett submits that, with respect to Art 22(e), there is clear evidence in this case that the appellant neither appeared nor was represented in proceedings before the District Court for an interim maintenance order and did not have proper notice nor an opportunity to be heard. He further submits that, in any event, the appellant did not have proper notice of the decision and an opportunity to challenge or appeal it on fact or law. Mr Bennett points to the fact that the interim maintenance order dated 15 December 2022, and not served until 9 January 2023, resulted from a without notice application and was made summarily whilst the substantive maintenance proceedings were stayed pending the determination of the non-recognition proceedings. Notwithstanding that the Proper Notice details the appellant's Polish legal representation, neither he nor his legal representative were present. Mr Bennett further relies on the document sent to the District Prosecutor which stated that no appeal was permitted, which is itself consistent with refusal by the court to provide reasons for making the order and the legal position at the time preventing the appeal of interim maintenance orders, which has since been amended by a change to the law on 9 March 2023 effective from 1 July 2023 allowing interim maintenance orders to be appealed.

56. Finally, as acknowledged in his Skeleton Argument, Mr Bennett notes that the court retains a discretion to recognise the order even where the court is satisfied that a ground for refusing recognition under Art 22 of the 2007 Hague Convention is made out. On behalf of the appellant, Mr Bennett submits that should any of the grounds relied on by the appellant under Art 22 be made out, it would not be appropriate for the court thereafter to exercise its discretion to recognise the order.

RELEVANT LAW

57. The 2007 Hague Convention initially entered into force in the United Kingdom as a result of the European Union's ratification of the Convention on behalf of all

European Union Member States, including Poland but excepting Denmark. Prior to the departure of the United Kingdom from the European Union, the 2007 Hague Convention was directly applicable, albeit supplemented by The International Recovery of Maintenance (Hague Convention 2007 etc) Regulations 2012 mentioned above. Following the departure of the United Kingdom from the European Union, the Private International Law (Implementation of Agreements) Act 2020 amended the Civil Jurisdiction and Judgments Act 1982 to provide that the 2007 Convention has the force of law in the United Kingdom.

58. The preamble to the 2007 Hague Convention refers to the United Nations Convention on the Rights of the Child in recalling that, pursuant to Art 3 of the UNCRC, in all actions concerning children the best interests of the child shall be a primary consideration. The Explanatory Report for the 2007 Hague Convention states as follows at [17] with respect to the role of the Convention in the protection of children:

> "It is worth underlining how the Hague Conference, in recent times, has successfully adopted several Conventions on the protection of children and adults, which notably include modern rules on the co-operation of authorities and on the recognition and enforcement of decisions. These are the 1980 Hague Child Abduction Convention, the 1993 Hague Intercountry Adoption Convention, the 1996 Hague Child Protection Convention and the 2000 Hague Adults Convention. In the meantime, the UN Convention on the Rights of the Child also entered into force in a large number of States in the world. The current Convention on maintenance is in harmony with the principles in all of these Conventions and can be considered as a significant further step in the protection of children and adults."

59. Chapter V of the 2007 Hague Convention governs recognition and enforcement. The Explanatory Report on the 2007 Convention states that the term "recognition" in the Convention refers to the acceptance by the competent authority addressed (in this case the English court) of the determination of the legal rights and obligations made by the authorities of origin (in this case the Polish District Court) and that the 2007 Hague Convention provides a system that is designed to provide the *widest* recognition of existing maintenance decisions. The Explanatory Report further makes clear that Chapter V of the 2007 Hague Convention applies both to situations where, as in this case, only recognition is currently sought and to situations where recognition and enforcement are sought.

60. Pursuant to The International Recovery of Maintenance (Hague Convention 2007) Regulations 2012, r.4(1), the Lord Chancellor is the designated Central Authority for England and Wales. Schedule 1 Paragraph 2(2) of the 2012 Regulations provides that an application for registration is to be transmitted by the Lord Chancellor to the family court. The application will thereafter be determined in the first instance by the prescribed officer of pursuant to Schedule 1 paragraph 2(4). Pursuant to Schedule 1 paragraph 2(5), the decision of the prescribed officer may be appealed to the Family Court in accordance with the relevant rules of court. Once the maintenance decision has been registered, it becomes enforceable in the family court in the same manner as a maintenance order made by that court, pursuant to Schedule 1 paragraph 2(8).

61. Art 23(7) of the 2007 Hague Convention provides that a challenge or appeal against the registration of an order may *only* be founded on the non-existence, as a matter of

fact, of any of the bases for recognition set out in Art 20 (which will not necessarily mean that the decision was not validly made in the requesting State but only that it cannot be recognised and enforced in the receiving State), or on the existence of one or more of the grounds for refusing recognition set out in Art 22, or on the authenticity or integrity of any document transmitted in accordance with Art 25(10) (a), (b), (d) or 3 (b) (a ground that is not relied on in this case).

62. With respect to the exhaustive bases for mandatory recognition and enforcement, which constitute indirect rules of jurisdiction, Art 20 of the 2007 Hague Convention provides as follows:

> "**Article 20**
>
> **Bases for recognition and enforcement**
>
> (1) A decision made in one Contracting State ("the State of origin") shall be recognised and enforced in other Contracting States if -
>
> a) the respondent was habitually resident in the State of origin at the time proceedings were instituted;
>
> b) the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;
>
> c) the creditor was habitually resident in the State of origin at the time proceedings were instituted;
>
> d) the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there;
>
> e) except in disputes relating to maintenance obligations in respect of children, there has been agreement to the jurisdiction in writing by the parties; or
>
> f) the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.
>
> (2) A Contracting State may make a reservation, in accordance with Article 62, in respect of paragraph 1 c), e) or f).
>
> (3) A Contracting State making a reservation under paragraph 2 shall recognise and enforce a decision if its law would in similar factual circumstances confer or would have conferred jurisdiction on its authorities to make such a decision.
>
> (4) A Contracting State shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and if the debtor is habitually resident in that State, take all appropriate measures to establish a decision

> for the benefit of the creditor. The preceding sentence shall not apply to direct requests for recognition and enforcement under Article 19(5) or to claims for support referred to in Article 2(1) b).
>
> (5) A decision in favour of a child under the age of 18 years which cannot be recognised by virtue only of a reservation in respect of paragraph 1 c), e) or f) shall be accepted as establishing the eligibility of that child for maintenance in the State addressed.
>
> (6) A decision shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin."

63. At paragraph 444 of the Explanatory Report to the 2007 Hague Convention the following statement is made with respect to habitual residence for the purposes of Art 20(1):

> "In this context, the term relates to a particular set of facts relevant to habitual residence that must be assessed on a case-by-case basis in the light of the context of the new Convention. The criterion of habitual residence allows for the determination of a sufficient connection between the individuals concerned and the State of origin. During the negotiations several delegations expressed concern that the complex case-law surrounding the definition of "habitual residence" which has developed in the context of the 1980 Hague Child Abduction Convention should not be imported into this Convention. There was general agreement that, because the contexts are different, the approach to the application of the concept of "habitual residence" should also be different. In the 1980 Convention the law of the child's habitual residence determines whether "rights of custody" exist such that a child's removal to or retention in a new jurisdiction is unlawful. On the other hand, in the present context "habitual residence" is a connecting factor for the purpose of recognition and enforcement in a Convention whose purpose is to facilitate the recovery of maintenance in international cases."

64. The Explanatory Report further states that, with respect to the existence of the bases of recognition and enforcement set out in Art 20(1) that rely on habitual residence, the existence of the ground of jurisdiction and the factual elements leading to it have to be assessed at the time when proceedings were instituted, without taking into account any possible change thereafter.

65. With respect to the basis provided for by Art 20(1)(c), it is the habitual residence of the creditor in the State of origin at the time proceedings were instituted that is required to be demonstrated. Art 3(a) of the 2007 Hague Convention provides that ""creditor" means an individual to whom maintenance is owed or is alleged to be owed". Paragraph 66 of the Explanatory Report provides as follows with respect to the interpretation of Art 3(a):

> "66 The first definition in paragraph a) of Article 3 is the definition of "creditor". In general, a creditor means the person who needs the maintenance and it can be a person to whom the maintenance has been awarded or the person who seeks a maintenance decision for the first time.

> It is helpful that the Convention clarifies this point, in order to avoid any assumption that it is only the person who is beneficiary of a decision who may be considered as a creditor, and not the person who is seeking maintenance for the first time. The term "creditor" includes, without any doubt, the child for whom maintenance was ordered or sought."

66. With respect to the grounds for refusing recognition and enforcement, Art 22 of the 2007 Hague Convention provides as follows:

> "**Article 22**
>
> **Grounds for refusing recognition and enforcement**
>
> Recognition and enforcement of a decision may be refused if -
>
> a) recognition and enforcement of the decision is manifestly incompatible with the public policy ("ordre public") of the State addressed;
>
> b) the decision was obtained by fraud in connection with a matter of procedure;
>
> c) proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted;
>
> d) the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed;
>
> e) in a case where the respondent has neither appeared nor was represented in proceedings in the State of origin -
>
> i) when the law of the State of origin provides for notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or
>
> ii) when the law of the State of origin does not provide for notice of the proceedings, the respondent did not have proper notice of the decision and an opportunity to challenge or appeal it on fact and law; or
>
> f) the decision was made in violation of Article 18."

67. With respect to the public policy ground under Art 22(a), the Explanatory Report suggests that the public policy exception is of very limited application and the question is whether recognition of the decision would lead to an intolerable result in the State addressed. The Explanatory Report further makes clear that verifying whether a maintenance decision is contrary to public policy should not serve as a pretext for embarking on a general review of the merits of the maintenance decision.

68. In *B v C (No 2)(1996 Hague Convention Art 22)* [2024] 4 WLR 3, this court considered the operation of the public policy provision in the 1996 Hague

Convention, which is in similar but not identical terms to Art 22 of the 2007 Hague Convention (in that Art 22 of the 2007 Hague Convention does not contain a best interests provision). As noted in *B v C (No 2)(1996 Hague Convention Art 22)*, in *R (on the application of GA & Ors) v Secretary of State for the Home Department* [2021] EWHC 868 (Admin) (a decision upheld on appeal in *Secretary State for the Home Department v GA & Ors* [2021] EWCA Civ 1131), Chamberlain J held that Art 22 of the 1996 Hague Convention requires the court to decide whether Art 22 applies or not, which is a question of law. By parity of reasoning, the question of whether Art 22(a) of the 2007 Hague Convention applies is, likewise, a question of law. Paragraph 478 of the Explanatory Report makes clear that the law under which the question of whether Art 22(a) applies by reason of recognition and enforcement of the decision being manifestly incompatible with the public policy will be the *lex fori*:

> "In its application of this provision, the competent authority should verify whether the recognition and enforcement of a specific decision would lead to an intolerable result in the State addressed. A discrepancy of any kind with the internal law is not sufficient to use this exception."

69. Within this context, and as articulated in *B v C (No 2)(1996 Hague Convention Art 22)* in relation to the 1996 Hague Convention, in determining the question of whether Art 22(a) of the 2007 Hague Convention applies, the court will need to have regard to the relevant domestic legal principles that govern the application of the doctrine of public policy. The domestic public policy rule is as articulated by Dicey, Morris & Collins on the Conflict of Laws 16th Ed. as follows at [5R-001]:

> "English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such a right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law."

70. As recognised in Dicey at [14R-148], under domestic law a foreign judgment is impeachable on the ground that its recognition would be contrary to public policy. Whilst the categories of public policy are not closed, the court will be cautious when considering questions of public policy, for the reasons set out by Lord Atkin in *Fender v St John-Mildmay* [1938] AC 1 at 12:

> "…Lord Halsbury indeed appeared to decide that the categories of public policy are closed, and that the principle could not be invoked anew unless the case could be brought within some principle of public policy already recognized by the law. I do not find, however, that this view received the express assent of the other members of the House; and it seems to me, with respect, too rigid. On the other hand, it fortifies the serious warning illustrated by the passages cited above that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide."

71. In this case, the appellant relies with respect to the public policy ground under Art 22(a) on what he asserts is the conduct of the Republic of Poland with respect to enforcement proceedings under BIIa, which the appellant asserts was contrary to the

principle of the rule of law. Where an English court is asked to conclude that a foreign jurisdiction displays a lack of independence such that justice will not be done, it has been made clear that comity requires that the court be extremely cautious before deciding that this is the position in the foreign jurisdiction and that considerations of comity will militate against any such finding in the absence of cogent evidence (see *The Abidin Daver* [1984] AC 398 and *AK Investment CJSC v Kyrgyz Mobil Tel Ltd v Others (Isle of Man)* [2012] 1 WLR 1804).

72. With respect to Art 22(b), and decisions obtained by fraud in connection with a matter of procedure, in seeking to draw a distinction between this ground and the public policy ground in Art 22(a), the Explanatory Report states that the concept of fraud presupposes the presence of a subjective element of wilful misrepresentation or fraudulent machinations, and not simply a mistake or negligence, on the part of the party seeking recognition and enforcement.

73. With respect to the ground in Art 22(e)(i) concerning notice, the Explanatory Report makes clear that the term "proper notice" in Art 22(e)(i) signifies that it is sufficient that the defendant be notified in a way to provide an opportunity to react, but that it is not necessary for the defendant to have been duly served.

74. Finally, Art 28 of the 2007 Hague Convention prohibits the State addressed from undertaking its own investigation into the merits of the decision in the State of origin. The Explanatory Report on the 2007 Convention makes clear that the provision is designed to ensure that the maintenance decision is not reviewed by the State addressed, although Art 28 is without prejudice to the review necessary to determine whether the provisions of Chapter V concerning registration and enforcement apply in the given case.

DISCUSSION

75. I am satisfied that the appeal should be allowed in circumstances where, whilst one of the bases for recognition set out in Art 20 of the 2007 Hague Convention is met, so is one of the grounds for refusing recognition set out in Art 22. Within this context, I am further satisfied that it would not be appropriate to exercise the discretion conferred by Art 22 in favour of recognition. My reasons for so deciding are as follows.

Art 21

76. With respect to the bases of recognition under Art 21 of the 2007 Hague Convention, save in respect Art 20(1)(c) it is plain on the evidence available to the court that none of those bases for recognition are of application in this case.

77. The appellant has at no point been habitually resident in the jurisdiction of Poland for the purposes of Art 20(1)(a) of the 2007 Hague Convention. The evidence before the court further demonstrates that the appellant did not at any point submit to the jurisdiction of Poland with respect to child maintenance, either expressly or by defending the respondent's claim without objecting to the jurisdiction of Poland at the first opportunity, for the purposes of Art 20(1)(b). It is likewise plain that the appellant at no point lived with the children in the jurisdiction of Poland or was residing in Poland whilst providing support for the children there for the purposes of

Art 20(1)(d). The dispute between the appellant and the respondent in the current context relates solely to maintenance obligations, meaning that Art 20(1)(e) as regards agreement as to jurisdiction does not apply. Finally, jurisdiction was not based on nationality and the maintenance decision was not made by an authority exercising jurisdiction on a matter of personal status or parental responsibility for the purposes of Art 20(1)(f).

78. Within the foregoing context, I am satisfied that it is only the appellant's submissions with respect to Art 20(1)(c) that require to be examined in detail when considering whether any of the bases of recognition under Art 21 of the 2007 Hague Convention are met in this case with respect to the order made on 15 December 2022.

79. As I have set out, on behalf of the appellant Mr Bennett submits that the date for determining whether the creditor is habitually resident in the State of origin for the purposes of Art 20(1)(c) of the 2007 Hague Convention is the date the maintenance proceedings were *instituted*. I accept that submission. The terms of Art 20(1)(c) are plain, namely that what is required is that "the creditor was habitually resident in the State of origin *at the time proceedings were instituted*" (emphasis added). The Explanatory Report for the 2007 Hague Convention reiterates this position at paragraph 452-3, which provides that the basis for recognition provided by Art 20(1)(c), namely the habitual residence of the creditor, and the factual elements underpinning it "have to be assessed at the time when the proceedings were instituted, without taking into account any possible change thereafter". Within the context of the plain terms of Art 20(1)(c), as reflected in the text of the Explanatory Report, I am satisfied that insofar as the Practical Handbook for the 2007 Hague Convention refers at paragraph 1144 to habitual residence at the time the maintenance decision was *made*, that must be an error in drafting. I have applied the test expressly set out in Art 20(1)(c).

80. I am further satisfied that, in this case, the maintenance proceedings leading to the interim maintenance order dated 15 December 2022 were "instituted" on 27 December 2021, based on the confirmation provided in the letter from the appellant's Polish lawyer dated 31 October 2024 stating that the application for an interim maintenance order was made within the maintenance proceedings issued by the respondent on that date. Whilst, in email communications with the court, the respondent stated that this court should not rely on information from the appellant's Polish lawyer, there is no reason to conclude that the information provided is inaccurate in circumstances where it was the proceedings issued on 27 December 2021 that were before the appellate court that made the interim maintenance order of 15 December 2022 pending determination of the appeal.

81. With respect to the test for habitual residence in the context of the 2007 Hague Convention, the Explanatory Report suggests that the principles applicable to the determination of habitual residence under the 1980 Hague Convention should *not* be imported when determining that issue under the 2007 Hague Convention. This position is explicable in circumstances where, as the Explanatory Report makes clear, under the 1980 Hague Convention the law of the child's habitual residence determines whether rights of custody exist such that a child's removal to or retention is unlawful whereas, by contrast, under the 2007 Hague Convention habitual residence is a connecting factor for the purpose of recognition and enforcement in a Convention whose purpose is to facilitate the recovery of maintenance. It is also important to note

in this context that, pursuant to Art 28 of the 2007 Hague Convention, the requested State is not permitted to review the merits of the maintenance decision.

82. Accordingly, and as made clear in the Explanatory report, the court should assess the facts relevant to the question of habitual residence under the 2007 Hague Convention on a case by case basis to determine whether there is a sufficient connection between the individual concerned and the State of origin to enable the requested State to recognise the maintenance decision that *has* been made, the merits of that decision not being open to review by the requested State. In determining this question, and again having regard to the fact that under the 2007 Hague Convention habitual residence is a connecting factor for the purpose of *recognition and enforcement*, the facts to be assessed will be case specific but will centre on those matters that connect the individual to the State of origin.

83. For the purposes of Art 20(1)(c), the individual concerned will be the "creditor". In seeking to demonstrate that the creditor in this case was not habitually resident for the purposes of Art 20(1)(c), Mr Bennett concentrated on an examination of the respondent's habitual residence as the "creditor" when making his submissions, although his submissions acknowledged the possibility that the children may be creditors. The decision of the District Court on 21 September 2021 makes clear that the case "for alimony" was brought by the children as applicants. Who, then, is the "creditor" for the purposes of Art 20(1)(c) in this case?

84. The Explanatory Report makes clear that the 2007 Hague Convention is intended to provide a system that is designed to provide the widest recognition of existing maintenance decisions across the Contracting States to the Convention. In the circumstances, a broad, purposive interpretation is appropriate when seeking the autonomous meaning of the term "creditor" in Art 20(1)(c). Art 3(a) of the 2007 Hague Convention provides that ""creditor" means an individual to whom maintenance is owed or is alleged to be owed". The Explanatory Report makes clear that the term "creditor" includes "without any doubt" the child for whom maintenance was ordered. The Explanatory Report further provides that a "creditor" is a person to whom the maintenance has been awarded *or* the person who seeks a maintenance decision for the first time. Accordingly, I am satisfied that Art 20(1)(c) will be satisfied in this case if *either* the mother and the children were habitually resident in Poland at the time the maintenance proceedings were instituted on 27 December 2021.

85. I am not satisfied that the evidence before the court can support a conclusion that the children had a sufficient connection with Poland so as to be habitually resident in Poland at the time maintenance proceedings were instituted on 27 December 2021 for the purposes of Art 20(1)(c).

86. It is clear that on 21 September 2022, nearly a year after the institution of maintenance proceedings, the District Court held in those proceedings that the children had their place of residence in the jurisdiction of England and Wales and that the Polish court did not have jurisdiction. As far as can be ascertained from the documents before the court, that conclusion has not yet been the subject of a successful appeal, the Regional Court confining itself on 15 December 2022 to making an interim maintenance order. Further, and any event, the evidence demonstrates that the stability and security of the children's life in Poland in the

period between 1 April 2021 and 27 December 2021 following their wrongful removal was not such as to establish a sufficient connection with Poland to ground the conclusion that the children had become habitually resident in Poland for the purposes of Art 20(1)(c). Prior to their abduction, the children had resided for the entirety of their lives in England, had their schooling in England, their access to services and their important relationships in that jurisdiction. Further, the children's circumstances were significantly disrupted by and following their abduction to Poland, including the respondent absconding with the children following the order of the Polish court in July 2021, which militated against them developing connections in that latter jurisdiction. The children's belongings remained in England and they remained on the school rolls in this jurisdiction. In all the circumstances, I am satisfied that there was no basis for concluding that the children had sufficient connection with Poland such that Art 20(1)(c) was satisfied in respect of the children as creditors at the time the maintenance order was registered by the MEBC.

87. Having regard to the context in which habitual residence falls to be established under the 2007 Hague Convention, I am satisfied that the evidence supports the conclusion that the respondent had sufficient connection with Poland so as to be habitually resident in Poland for the purposes of Art 20(1)(c) as the person to whom the maintenance has been awarded.

88. I accept that, prior to her abduction of the children, the respondent was integrated in England and that, following the abduction, she maintained financial arrangements in England that included a loan facility available only to those resident in the United Kingdom, continuing to claim benefits in England by way of child tax credits until August 2021 and child benefit until October 2021, continuing to seek payment of child maintenance vial the CMS for the period June 2021 to April 2022, receipt of an HMRC Self-Employment Income Support Grant on 4 May 2021 and a payment made to the DBS on 26 October 2021 for a 12 month renewal. I likewise acknowledge that the respondent maintained a UK mobile phone throughout the period and that the former matrimonial home had been preserved for the respondent and the children until August 2024, in which many of the respondent's possessions remained. It is also clear that from 1 April 2021, the respondent and the children were residing with the maternal grandmother, and at times moving from property to property in order to avoid the enforcement of orders made by the Polish court.

89. Against these matters however, the respondent is a Polish citizen. Albeit in circumstances that fall to be deprecated, in April 2021 the respondent was returning to the country of her birth in which she had been raised and resided prior to 2005. At this point it is tolerably clear that, having wrongfully removed the children from the jurisdiction of England and Wales, the respondent intended to remain with the children in the jurisdiction of Poland. Whilst these circumstances again fall to be deprecated, on balance I am satisfied that when maintenance proceedings were instituted by the respondent 8 months after her arrival in the jurisdiction of Poland, the respondent can be said to have had a sufficient connection with the jurisdiction of Poland at the time maintenance proceedings were instituted to have been habitually resident in Poland for the purposes of Art 20(1)(c).

90. However, whilst I am satisfied, on balance, that a basis for recognition under Art 20(1)(c) of the 2007 Hague Convention is made out by reference to the habitual residence of the respondent, I am also satisfied that ground for non-recognition under

Art 22(e) is made out in this case and should have led to a refusal to register the interim maintenance order made by the Polish court on 15 December 2022.

Art 22

91. As I have noted above, the Explanatory Report makes clear that the term "proper notice" in Art 22(e) signifies that it is sufficient that a defendant be notified in a way to provide an opportunity to react, but that it is not necessary for the defendant to have been duly served with the maintenance proceedings. However, in this case it is clear beyond peradventure on the evidence available that the appellant was not notified in *any* way of the hearing on 15 December 2022. It is further clear that the interim decision was not subject to appeal. In the circumstances, I am satisfied that the appellant was not provided with an opportunity to be heard or for representations to be made on his behalf for the purposes of Art 22(1)(e)(i) or an opportunity to challenge or appeal the decision of 15 December 2022 on fact and law for the purposes of Art 22(1)(e)(ii).

92. The interim maintenance order dated 15 December 2022 resulted from a without notice application and was made summarily whilst the substantive maintenance proceedings were stayed pending the determination of the non-recognition proceedings. Neither the appellant nor his legal representative were present. The appellant's lawyer confirms he was not provided with an opportunity to make representations for the appellant prior to the order of 15 December 2022 being made. On 19 December 2022, a copy of the interim maintenance order was served on the District Prosecutor by the Polish court including the words: "Instruction: the decision is not subject to an appeal". Whilst a copy of the interim maintenance order served on the appellant's Polish lawyer did not include the instruction endorsed on the copy sent to the Public Prosecutor, the refusal of the District Court on 17 January 2023 to provide written reasons when requested by the appellant's Polish lawyer to do so is consistent with the interim maintenance order not being, under the law that then applied, appealable. Whilst in the Statement of Proper Notice served on the District Prosecutor on 19 January 2023 the box labelled "The respondent had proper notice of the decision and an opportunity to challenge or appeal it on fact and law" was checked, in the Proper Notice filed on 30 January 2023 the box was left unchecked. In these circumstances, I am satisfied that the ground for non-recognition under Art 22(e) is made out on the evidence before the court.

93. As set out above, the appellant relies on a number of additional grounds for non-recognition under Art 22 of the 2007 Hague Convention. However, in circumstances where I am satisfied that the grounds for refusal under Art 22(e) are made out in this case, I can take the remaining grounds briefly.

94. The Explanatory Report makes clear that the public policy exception under Art 22(a) is of very limited application, the question being whether recognition of the decision would lead to an intolerable result in the State addressed. It is further clear from decisions such as *The Abidin Daver* and *AK Investment CJSC v Kyrgyz Mobil Tel Ltd v Others (Isle of Man)* that, by parity of reasoning, where it is said that the offence against the public policy of this jurisdiction is grounded in the asserted failure by reason of alleged political interference of the courts of another State to adhere to international Treaty obligations and that recognition would assist to perpetuate a situation arrived at as the result of the breach of the rule of law in that State, comity

requires that the court be extremely cautious in its approach before concluding that this is the position in the foreign jurisdiction.

95. In the foregoing context, with respect to Mr Bennett's first submission regarding Art 22(a), I acknowledge that the EU has taken infringement proceedings against the Republic of Poland, in which the United Kingdom has registered its interest, and that this case is one of those cited by the European Commission as evidencing the failure by Poland to honour its obligations under BIIa. However, those infringement proceedings have not yet come to a conclusion. I have also considered carefully the evidence relied on by the appellant in the form of messages on X (formerly Twitter) from Polish politicians following certain decisions of the Polish courts in this case and the letter of 21 November 2022 from the Vice Consul at the Polish Embassy in London to the Family Court sitting at Barnet seeking for the English court to make an order against a British national. However, whilst on their face these communications are a matter of concern, and in respect of the letter to the court appear to contravene established consular protocol, such evidence does not come close in my assessment to the type and quality of evidence required to ground a finding by this court that the approach of, and the orders made by, the Polish courts in respect of the *children* were the result of political interference in the process in that jurisdiction. Such a finding would be the necessary condition precedent to a conclusion contended for by the appellant that recognition of the *maintenance* order of 15 December 2022 would finance and entrench the continuing unlawful retention of the children in the jurisdiction of Poland that results from a failure by Poland to meet its obligations under BIIa due to political interference and, accordingly, manifestly incompatible with the public policy in the United Kingdom of maintaining the rule of law.

96. With respect to Mr Bennett's second submission that, in the context of a deliberate child abduction or retention, it would in any event by contrary to public policy for the purposes of Art 22 to permit reciprocal enforcement of a maintenance order where this would perpetuate the harm to the child consequent upon that conduct, there are two key difficulties when addressing that submission.

97. First, where a situation of alleged child abduction or retention remains to be resolved, the competent authorities will be anxious to ensure stability and security for the subject child or children pending determination of any dispute between the adults. Within this context, to refuse to register an order making financial provision for children may itself risk harm to a child if it prevents that child's basic needs being met by depriving them of economic security in the interim, requiring the registering authority to balance that harm or risk of harm against the harm or risk of harm contended for by the parent resisting registration (the preamble to the 2007 Hague Convention recalling that, in accordance with Art 27 of the UNCRC, every child has a right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development). Second, and within that context, before determining that it would be contrary to English public policy for the purposes of Art 22(a) to permit reciprocal enforcement of a maintenance order on the grounds that this would perpetuate harm to a child, the registering authority will need to be satisfied that the result of recognition *would* likely be the perpetuation of harm. That will often be a matter of significant dispute between the parties, as it is in this case. Further, in this case and in the context of it not being open to this court to conclude on the evidence that the approach of, and the orders made by, the Polish courts in respect of the

children were the result of political interference in the process in that jurisdiction for the reasons I have set out, there is also the fact that the Polish appellate court appears to have taken a different view regarding the consequences for the children of remaining in Poland.

98. All this is not to say that a submission of the nature now advanced by Mr Bennett will inevitably be incapable of being made out. However, the court will be required to approach such submissions with caution where, within the foregoing circumstances, its determination will likely require the court to reach a conclusion on heavily disputed matters, risking the question of registration becoming a forum for collateral litigation of the central areas of dispute between the parties in the substantive proceedings relating to the alleged abduction or retention. This need for caution will be thrown into sharper relief where the court is satisfied, as it is in this case, that alternative grounds for refusing registration are made out.

99. In this case, accepting the second submission advanced by Mr Bennett in respect of Art 22(a) would involve accepting without more the contents of the psychological report from the Polish proceedings where that report is not before this court, the court has not heard evidence in respect of it and where has not been the subject of detailed argument. In this context, and in the context of the twin difficulties outlined above, I am not satisfied that it would be appropriate to conclude in this case that registration is contrary to public policy for the purposes of Art 22(a) by reason of registration perpetuating the harm to the children.

100. In the circumstances, whilst I have considered carefully the matters relied on by the appellant, I am not satisfied that the ground for non-recognition under Art 22(a) of the 2007 Hague Convention is made out in this case.

101. With respect to the ground of fraud under Art 22(b), at paragraph 480 of the Explanatory Report, the authors make clear that fraud in connection with a matter of procedure requires deliberate dishonesty or deliberate wrongdoing, giving the example of deliberately serving a writ, or causing it to be served, at the wrong address, seeking to corrupt the authority or concealing evidence. As I have noted, in seeking to draw a distinction between this ground and the public policy ground in Art 22(a), the Explanatory Report states that the concept of fraud in connection with a matter of procedure presupposes the presence of a subjective element of wilful misrepresentation or fraudulent machinations, and not simply a mistake or negligence, on the part of the party seeking recognition.

102. In this context, Mr Bennett relies on what the appellant contends is evidence that the respondent implied to the Polish court that the children had only been temporarily in England, asserted that the appellant was not involved with the children's lives, alleged that the appellant had bribed Cafcass and court staff, stated that the Certificate of Entitlement to a Decree was in fact a certificate of divorce and represented the term "unreasonable behaviour" as meaning the divorce had been granted based on the sole fault of the appellant and claimed the non-molestation order was probative of an assertion that the appellant "used violence towards his family" and distorted the position as to whether mediation was possible.

103. The difficulty with these assertions is twofold when it comes to establishing the ground for non-recognition under Art 22(b). First, determining whether the matters

relied on by the appellant represent deliberate dishonesty or wrongdoing containing an element of wilful misrepresentation or fraudulent machination, represent misunderstandings (particularly in respect of the effect of formal court documents in circumstances where the respondent is a lay person), represents frank disagreements between the parties on the evidence as to what transpired between them or are a combination of all three. Second, and more fundamentally, the extent to which the assertions go to demonstrate fraud "in connection with a matter of procedure" as required by Art 22(b). In order to demonstrate fraud on a matter of procedure for the purposes of Art 22(b) the evidence needs to demonstrate clearly both that the conduct relied on comprises deliberate dishonesty or wrongdoing containing an element of wilful misrepresentation or fraudulent machination *and* that it relates to a matter of procedure. I am not satisfied that the evidence in this case does so. In the circumstances, I am likewise not satisfied that the ground for non-recognition under Art 22(b) is made out in this case.

104. Finally, the terms of Art 22 of the 2007 Hague Convention make clear that the court retains a discretion to recognise an order notwithstanding that a ground for non-recognition under Art 22 is made out, Art 22 providing that recognition and enforcement of a decision *may* be refused. It would not be appropriate to exercise the discretion in favour of recognising the order in circumstances where the due process ground under Art 22(e) is manifestly satisfied for the reasons set out above.

CONCLUSION

105. In conclusion, I allow the appeal against registration for the reasons set out in this judgment and set aside the registration of the order. I will ask counsel to draw the order accordingly.