



Neutral Citation Number: [2023] EWHC 243 (Fam)

Case No: FD21P00356

IN THE HIGH COURT OF JUSTICE
FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08.02.23

Before :

MRS JUSTICE MORGAN

Between :

PZ

Applicant

- and -

TB

Respondent

Michael Hosford-Tanner (instructed by **Duncan Lewis Solicitors**) for the **Applicant**
the **Respondent** appeared in person

Hearing dates: 4 – 7 October 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 08.02.23 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE MORGAN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Morgan :

1 In April of this year Mr Justice Peel heard an application in respect of two children, KB who is now 14 and her brother KC who is 12. The children are living in Libya. They have been living there since 2020 with their Paternal Grandparents. An application by the Mother for their return from Libya and to her care made in June 2021 brought the matter ultimately to a hearing before Peel J at which the following questions fell to be determined :

- i) Whether the court has jurisdiction to make return and welfare orders on the basis of the habitual residence of the children;
- ii) Whether, if it does, the proceedings in this jurisdiction should be stayed in favour of proceedings taking place in Libya;
- iii) If the answer to (i) is yes and (ii) is no, whether a return order and/or other welfare orders should be made.

2 In a judgment following that hearing see [2022] EWHC 1073 (Fam) Mr Justice Peel determined that the courts of England and Wales have jurisdiction to make return and welfare orders on the basis of habitual residence of the children. I do not intend in this judgment to repeat the detail of the background to the application before this court which he set out there. I adopt it and this judgment is to be read with that one. Having found that this court had jurisdiction Peel J declined to stay the proceedings in favour of proceedings which are ongoing in the courts of Libya. He did not at that stage however go on to make a determination as to whether a return order or other welfare order should be made but, instead, he provided for a fuller welfare enquiry by the Cafcass Officer, Ms Demery. Ms Demery at the time of that hearing had already prepared one report but directions were made for a further report. Having made directions his Lordship adjourned the matter part heard for that welfare decision to be considered at a later hearing. It is that hearing which comes before me.

The Position of The Parties at this Hearing

3 At this hearing the Mother, who continues to be represented by Mr Hosford-Tanner, seeks a return of both children to her care in Sheffield. Her position is that she will not go to Libya either to live there or to visit the children should they not return. In fact, there is already an order for the children's return made as long ago as 17th June 2021 by Mr Justice Poole. Whilst that order has not been stayed, there remains in place an order made by Mr Justice Moor, on 17th November 2021, that there shall be no enforcement of it until the conclusion of these proceedings. So, in asking for the children's return, Mr Hosford-Tanner asks me to give effect to that order. The Father, by an application made 12th August 2022, asks me to set it aside.

4 The Mother's position is that if the children are returned here, they can resume their place (in the case of KB) or take up the place (in the case of KC) at the school local to her home. The father can remain in the United Kingdom or travel to and from Libya as he did during the latter stages of the marriage and the children can move freely between the parents. She would not, as I understand her case from Mr Hosford-Tanner, support the children visiting Libya on holiday and so from that I infer that any contact with either the paternal or the maternal wider family who live there would be over some digital platform, or perhaps during holidays to a third country.

5 The Father, who had previously been represented by specialist Counsel has before me represented himself. Although he said he had some anxiety at whether he would be able to express himself sufficiently clearly, since he is not a lawyer, he has been well able to get his points across and indeed produced in advance of the hearing a detailed position statement in writing. His position is that the children should remain in Libya and that, although pursuant to

an order of the Libyan court the Paternal grandfather now holds guardianship for them, the arrangement for the future should be as follows:

6 If both parents go to live in Libya there should be a shared care arrangement between them, the details of which will require negotiation and agreement but will be broadly a 3-night/4-night division of the time - each child spends between the parents living separately. If the Mother does not go to live in Libya then the children should live with their father (with the support of his family); spend time with her if she visits Libya and have contact otherwise over digital platforms. My understanding of his position in principle about contact between mother and children outside Libya is that were it to be possible for the children to travel (there is in place at the moment a travel ban by the Libyan Court in the ongoing proceedings there) he would not be opposed to that. However, he would want to know that the children would be returned to Libya following any such trip. He also told me that he felt - he might not be able to arrange for the children to travel because of the legal proceedings on foot in Libya, a point he had made earlier in his interviews with Ms Demery. As part of his case he seeks therefore that I set aside the order for return of the children to this jurisdiction. He also seeks a return of his passport to him to enable him to travel and be with his children. It is, he submits, the retention of his passport which has prevented him travelling as he otherwise would have done to Libya and so has left the children without either parent.

The Evidence and Submissions at this Hearing

7 I heard oral evidence from both parents and from Mrs Demery and oral submissions on behalf of each parent, amplifying the detailed position statements from each with which I had been provided at the outset. In addition, since these are Libyan children of Libyan parents, and the Embassy of the State of Libya is an intervener, on the day I received submissions Mr Gedal, consular and embassy legal adviser to the Libyan Embassy appeared to make short submissions on the direct instruction of the Ambassador.

8 Mr Gedal wished to impress upon me the desire of the Libyan embassy to be as helpful as possible in assisting with any decisions which this court might make but emphasised of course that these are children of a Libyan family. He also made explicitly clear that the Embassy and the Libyan government did not advocate for either parent in the cause before the courts of England and Wales and was entirely even-handed and neutral as between the two. He was keen for me to understand that although there had been some relatively modest financial contribution made to the father's legal fees (for advice) this was not to be taken as supportive of the father's position but is a common practice of the Embassy where a Libyan citizen is without legal aid. Had the Mother not been in receipt of legal aid she would have been offered similar financial assistance. Naturally I accept that.

9 Mr Gedal told me that the Embassy was keen to offer assistance and cooperation to the extent possible and is desirous of continuing improvement in relations with the United Kingdom. I accept that also. He was helpful in providing further responses to questions I had as to how the Embassy might be able to help in relation to some aspects of the difficulties which face me in this case arising from the Libyan Court's travel ban on the children - which prevents them leaving Libya to see their mother and from the difficulty Mr Hosford-Tanner submits the mother would experience travelling into Libya to spend time with her children should they not return here.

10 Following on from his appearance to make short written submissions Mr Gedal returned to take further instructions at the Embassy and sent the following information which for the sake of clarity I reproduce here :

Firstly and in respect of assistance to be provided for the removal of travel bans placed on the children, in the event the court finds that they should reside in Libya - the Ambassador has provided his assurance that the Embassy will begin immediate enquiries as to how this can be facilitated and any measures that can be taken to achieve this will be done so.

However, the Ambassador also stressed that the most practical and time effective way for this to be achieved would be for the Father, [TB] to write a formal request to the Libyan authorities stating that he wishes the travel ban to be removed so that his children are free to visit the United Kingdom. I am told that this request would supersede any efforts that might be made by the Embassy or the Consulate and that the bans could be lifted almost immediately, should this be something that is formally requested by Father.

My next point relates to the question concerning assurances that might be made by the Libyan Government to ensure, that in the event the court finds that the children are to reside in the UK, the children would be able to visit Libya and return to the UK freely - the Ambassador explained that the position of the Libyan Government is that a Libyan court order, ruling on the habitual stance of Libyan children, would always be given precedent over a court order issued elsewhere and that no assurances could be provided that the contents of a foreign court order would be applied in Libya by Libyan courts who hold an opposing view.

11 It follows therefore that whilst it is most helpful to know of the willingness of the Ambassador to give the assurances he does in respect of the travel ban, the likely approach, should I direct the children's return, is in line with that which Mr Edge, the jointly instructed expert advised would be the case.

12 In respect of the question of what if any reassurance this court might be given as to the Mother's ability to travel safely into and out of Libya to see her children if they were to remain there, Mr Gedal sent the following answer which, again for the sake of clarity I reproduce here:

With respect to protection and support provided to the Mother should she wish to return to Libya to visit her children, the Ambassador has provided his personal assurance that the Mother would be afforded all protection available and it could be arranged that her children are brought to greet her at the airport when and if she returns. He also stated that this has always been the stance of the Embassy.

I have been grateful for the help and assistance of the Ambassador in conveying his assurance that the mother would be afforded all protection available.

13 The information provided by Mr Gedal concluded with the following:

Finally, the Ambassador echoed the question that I asked yesterday which was, in the event the Court decided that the children should remain in Libya, what assurances, if any, could be provided to the Libyan Embassy, that upon visiting the UK, the children would not be subject to a travel ban that would prevent them from returning to Libya.

14 As well as the evidence given orally I was provided with a very great deal of documentary evidence in the bundle, some of which predated the hearing before Mr Justice Peel and some of which has been generated since then. The Parties had set out their detailed accounts in the very lengthy statements and exhibits included in the trial bundle which I read in advance of their oral evidence. I will not in this judgment set out all that I have heard and read but will make reference to that which I have found to be of particular relevance, and which has assisted me in reaching my decisions.

15 Within the judgment at the order following from it, Mr Justice Peel expressed the view (subject to that of any later trial judge) that it was unlikely to be necessary to explore the cross-allegations of violence as between the parties. I agree, and, as it has turned out at this hearing, not only has neither the mother nor the father's case been structured and presented in a way which has sought clear findings on those aspects but the cogency of the evidence (save in respect of the video evidence submitted by the father) has not been such as to support findings.

16 An issue which Peel J did foresee might require some exploration – and again I agree - is the allegations which the children made to the authorities in Libya of serious physical ill treatment at the hands of their mother. I have had the benefit at this hearing of the further report from Ms Demery amplifying her earlier report. At some inconvenience to herself Ms Demery made herself available to attend on the first day of evidence. Ms Demery is a very experienced member of the High Court team and her experience, as might be expected embraces the unhappy situations where children are separated from one or another parent because they have been taken out of the jurisdiction. She is clear – and it is in any event obvious – that it is emotionally damaging to a child to lose the presence of one of their parents in their life in this way. This case is unusual for the children with whom I am concerned have neither parent in their lives. Her oral evidence was thoughtful and child centred. She said several times that this was in her view a finely balanced case in which there were no ideal outcomes for the children given the unhappy situation they are now in. She had concluded in her report that the least disruptive outcome would be for the children to remain where they are, a view from which she did not depart in her oral evidence. She readily acknowledged that the fact that she had had to conduct her enquiries of the children over a digital platform rather than in person was bound to have had some effect on the quality of those enquiries, but nevertheless she had been able to engage with the children well enough to ascertain sufficiently their wishes and feelings. She had given thought to whether it would be appropriate for the children to have their own representation in these proceedings – something for which the father had invited me to make directions at the PHR – but she did not think it necessary.

17 She explained that the children were well cared for in Libya at their grandfather's home and that they were weary of the ongoing proceedings and of being asked questions. She had no concerns at all about their physical and educational well-being, and her view was that living with their paternal family has proven to be a safe and secure neutral space away from the conflicts and difficulties in the parental relationship. It is a benefit that they have the support of a large extended family nearby in Libya, although there have been difficulties in seeing the maternal family. When they were living in Sheffield there was no family nearby; their father was mainly based in Eastbourne, and their maternal aunt was in London. It is however their emotional welfare which worried her since they remained separated from both their parents and she was concerned about that absence from their lives. Asked by Mr Hosford-Tanner if that harm to their emotional wellbeing only got worse the longer they remained in Libya and separated from their parents, Ms Demery said she wasn't sure that she could agree that was the case. It might be that as time went on and the children became more used to it it was less

harmful, one simply could not tell. Certainly, the children had been shocked when they were first taken to Libya but that shock had lessened and Ms Demery's professional view was that they were settled. She was explicit that she was not using that in the Hague sense but as a descriptor of the children's lives – they were doing well at a good school and had made friends there. Each spontaneously and naturally referred to Libya as 'home'. In expressing a strong preference to remain there and a wish not to return to the UK they did so recognising that it would probably mean that they would not have their mother with them since she was unlikely to come to Libya. When she gave her oral evidence, Ms Demery expressed some doubt that the seemingly settled situation for the children could extend fully to their psychological settlement when neither their father nor their mother were with them. It remained her view that the hostility and conflict between the parents and court proceedings in two jurisdictions have left the children in limbo and that the ongoing proceedings and uncertainty are not in their interests.

18 As to KC, Ms Demery confirmed what she had said in her report that she observed a firming of his position. She felt he was frustrated with being asked questions about his family by multiple adults, and her view was that he wished to be allowed to move on with his life. She thought he had settled and adapted to family life as he knows it now. Ms Demery had reached the clear view that he is now adamantly opposed to returning to the UK. It was evident to her that the children ideally would want to live with both parents. Were that not to be possible they would want to live with one parent and spend time with the other. KB appeared to believe that her mother had not done all that she could to be with them, and believed that if she had wanted to the Mother could have travelled to Libya. In the body of her report, Ms Demery had observed that it was not entirely clear to her either; why it was the Mother had not travelled to Libya or engaged with authorities there and thought it likely that both the children would need a more thorough explanation in order to understand. Ms Demery accepted to an extent when cross-examined on behalf of the Mother that her fear of being portrayed as -someone of dubious moral qualities might give her cause to be fearful and that the statement provided by the father, at the court's direction, to assist the Mother in the Libyan courts, might well, had he not been forbidden to disclose it, have had precisely the effect of portraying her in that way. Nevertheless, she had been left with the impression that KB, in particular, may have the sense the Mother had abandoned her.

19 Ms Demery was asked by Mr Hosford-Tanner about the influence which the paternal family must surely have exerted on the children and her view remained as in her report, that whilst she could not rule out that either KB or KC had been unduly influenced by their paternal relatives, they have lived within their parents' difficulties since the time of their relationship breakdown until now. It remained her view that it is likely that they know more about their family issues than they should. My impression of Ms Demery's evidence is that she found it hard to know what to make of the allegations -they have made in respect of their mother. In her report she noted that she had reflected on the abuse they said they have experienced and their exposure to the volatility of the parental disputes, and in the circumstances felt their views are perhaps unsurprising. Ms Demery said – and I agree - that the videos the father exhibited point to an abusive and uncomfortable home environment for the children, from which neither parent protected them. Mr Hosford-Tanner made the point to her that showing the children those videos was neither in their interests nor child focussed. He is right about that of course but neither was the behaviour which can be seen within those recordings. I readily accept the point made by Ms Demery that there is fault with both.

20 Ms Demery had also had discussions with the paternal grandfather of whom she reported that he was equally critical of his son and daughter-in-law. His view was that he had acted protectively of his grandchildren and appropriately within the legal framework of his country. What was not clear to the Cafcass officer was how the paternal grandfather would intend to support, promote, and facilitate the relationship between the children and their parents should they remain living with him. I accept the view offered by Ms Demery that the inconsistent communication between the children and their mother has not been sufficient.

21 I have read carefully the written opinion of the instructed expert Mr Edge. Included within the helpful evidence he provides to this court is that in the event that a return order is made by this court it will be likely to be of no effect since: *If the English court makes orders for the return of the Children these will not be enforced in Libya if they are considered to be contrary to Libyan public policy which in the case of guardianship and custody would require compliance with the Shari'a provisions of the 1984 Law.* Furthermore, Mr Edge advises *There is no procedure for mirror orders to be made or for the Libyan courts to enforce or recognise any court order that is made in the UK. Any court orders or findings made by a UK court would not be enforceable or admissible in any Libyan court proceedings as such.*

22 Mr Gedal, in the course of his oral submissions, indicated that it was very likely that the Embassy would do all it could to assist by way of perhaps facilitating conversations but the impression I had, and from which he did not demur when I asked him, was that an order that these children who are nationals of Libya should return here where they are habitually resident is not one which would be given effect in Tripoli. I have borne in mind, as Mr Hosford-Tanner invited me to, that by analogy to a situation in which the court is considering whether to exercise the protective *parens patrie* jurisdiction (which I am not) the emphasis given by Baker LJ in *CG v AS [2021] EWCA Civ 1223* to the fact that whether it will be possible to enforce any orders would arise only after a decision to exercise its protective jurisdiction has been made. So says Mr Hosford-Tanner the question of whether it would be possible to enforce in Libya or to compel the respondent to comply with any order I were to make for return, falls to be considered only if and when I make it, and not as part of the process of reasoning as to whether to make it at all. I, of course, see why Mr Hosford-Tanner takes that position. It seems to me, however, that I should not ignore when as here I am concerned with a welfare decision for these two children, any continuing or additional impact on their welfare which may result from the enforceability or otherwise of any order made for their return. The more so in the light of the careful and detailed analysis I have received from Ms Demery within which she identifies as a particular difficulty for the children the fact that they are held in limbo as she expressed it as a result of being caught in the court proceedings between their parents in the English court and the Libyan court. It seems to me also that to the extent that there might be persuasive value in withholding the father's passport so as to encourage him to facilitate any return order, the immediate effect of that is to perpetuate the separation which has already been identified as contrary to the children's welfare. That is of course to look at that aspect purely in welfare terms -were I to be considering enforceability it would be necessary to have a keen eye on the extent to which it is permissible to compel compliance by means of prolonged withholding of passports.

23 I agree with Ms Demery that the views of these two children must be given significant weight given their ages and Ms Demery's assessment of their understanding. Albeit that those views are not determinative. She acknowledges that they are likely to be influenced to an extent by their paternal family. I agree that it would be unrealistic to think otherwise, and I note

that her recommendation is made with that very much in mind. In cross examination both Mr Hosford Tanner and the father each explored with her the fact that the children did not repeat to most of the allegations said to have been made against the Mother of physically abusive behaviour towards them when the Paternal grandfather took the children to the police and the Libyan authorities. Though KC maintains that she hit him after he broke a mobile phone and the allegations which form the subject matter of the digital recordings remain. On behalf of the mother the point is made that were there truth in allegations one might have expected the children to repeat them to the Cafcass officer. The father suggested to her that it is likely that with good care and time, the experiences have faded from the minds of the children. Mrs Demery did not feel able to say what was the explanation but what she could say was that the allegations were not repeated to her. She agreed that it was likely to have been emotionally harmful to the children to take them to the police station to make allegations about their mother's treatment of them, though she reminded me that she did not think she could look at it (as she was asked to for the mother) in terms of what would have been done in this country since the system is so different in Libya.

24 I have come to the conclusion that the fact that the children did not repeat the wider allegations the made to the police 2 years earlier to Ms Demery does not help me to know whether they were true or not. I do however think that the fact that the children who have now been living in the home of their paternal grandfather for more than 2 years did not repeat those allegations to the Cafcass officer, makes it more likely that the views that they do express as to their wishes and feelings are their authentic views rather than the result as the mother suggests of the malign influence of the paternal family. It was notable that in fact each of the children would like to see their mother something that I would not expect to be the position were they simply reflecting negative influence.

25 I accept Mrs Demery's evidence in response to questions from Mr Hosford-Tanner that if the children were to return to the United Kingdom they would need support and psychological assistance. Given the time that has passed I agree that they are going to be, as she put it, *very different children from the ones who were taken to Libya*. Their interests and educational needs are different. Ms Demery makes the point that KB is now partway through her IGCSE course and, whilst the point is made on behalf of the mother that the school she attends in Libya follows largely the British educational syllabus, I do not accept the submission that that means it would be possible to make a seamless transition midway through her exam syllabus. I agree with Ms Demery that it would be a very great disruption to her at a key stage in her education. It would also be contrary to her expressed wishes. Ms Demery's assessment, which I accept is that both children want to remain in Libya and so may be disgruntled at returning to Sheffield where they had not been entirely happy with school and living arrangements and would both require what she called *a great deal of help and support*. Her assessment with which I agree is that it would be destabilising for the children to return.

26 If circumstances of their wider welfare require it then it may be impossible to avoid destabilising and disrupting the children in that way. The mother's case is that quite aside from the family disputes the children should not remain in Libya as it is an unstable and dangerous state which is essentially in a state of civil war. In her evidence she told me that it is run by Militia. To some extent support is given to that view by the acknowledgement from Mr Gedal that there remains unrest in the country. Mr Hosford-Tanner reminds me that the continuing Foreign and Commonwealth Office advice is strongly against travel to Libya. As a matter of generality of course that is right but it is the case that there are parts of Libya where those with means - as are both sides of the children's family to a greater or lesser degree - live in comfort

within enclaves of safety. Indeed, Mr Hosford-Tanner undermines somewhat his own submission on that point by elsewhere suggesting that a component in the children's wish to remain in Libya may be the relatively luxurious facilities of their expensive private schools which could not be matched by what was available to them in Sheffield. Moreover, KB's puzzlement at the dissonance between what she knows her mother describes of Libya and her own experience of it reinforces that whilst there is indeed much in Libya that is problematic, it is not a uniform picture or a universal experience. Both sets of grandparents are in Libya (in the Tripoli area) as are many of the children's extended family. In the course of this hearing I heard the unchallenged evidence that the Mother's sister has relatively recently moved back there. To the extent therefore that the Mother invites me to weigh in the balance that the children would be at physical risk were they to remain in what is essentially a 'war zone' I treat that with some circumspection. It is in part that aspect of the Libyan situation that the Mother says explains that she has not visited the children during the more than 2 years they have been there without their parents. Were that the only reason, the seeming mystification with which KB spoke of it to the Cafcass officer would seem well founded. I accept, however, that there may be more reason for the Mother to be afraid of the reception she may have from the authorities given the characterisation of her to the police and the child protection services there as a bad and neglectful mother and a wife who had strayed. She told me in her oral evidence that she would fear for her life. My strong impression from the mother's oral evidence is that is the latter aspect rather than the former which is really prominent in her thinking when she tells me that that she will not return to Libya.

27 That impression is reinforced by the mother's own written evidence when, giving her own account of the discussions she said that there had been between the parents about the holiday to be taken in 2020 said this: *Before I went to Turkey, we had plans to take the children to Libya for a holiday but this was before the pandemic started and because the cases in Libya were rising, I suggested that we should go to Turkey instead to visit my family.* That is a reference to the Covid 19 situation in Libya – and not the unstable and dangerous geopolitical situation - as the reason why the Mother changed her plans to travel there. On the evidence before me at this hearing I am not satisfied that the inherent risk that the Mother suggests there is to the children from the fact of being in Libya is at the level she pitches it.

28 Since the Mother has not visited the children, it is unfortunate that neither have they had more than the most minimal contact with their maternal family who live in Libya. It is another aspect of the case where the concerns of adults appear to have left behind the interests of the children. KB invited her grandparents to come to visit on her birthday. They did not. Nor in fact on the evidence before me did they respond to the invitation. The mother's evidence is that her mother tried to send a response but it was undelivered and she accepted that there had been no other attempt to telephone or make contact. Nor, curiously do they seem to have sent a birthday card or a present or any tangible indication by which KB might have understood that she was in their thoughts. The father asked Ms Demery what she thought the children might have made of this and she agreed it was likely to have been disappointing and the children would have wondered why there was nothing. The children have not been permitted to go to stay with their maternal grandparents. The father says that the mother's cousin threatened him and that is why. Although the mother at first denied this, in cross examination the father was able to demonstrate from her own statement and digital communications that it was so since she had remonstrated with the cousin. Whatever the detail of it, and I do not find myself in the position of being able to determine that, it is the children who have borne the loss.

29 On one occasion the maternal grandparents saw the children at the offices of the child protection services. I am sure that that was an environment that was very far from congenial but I was surprised to hear from the mother in her evidence that they had been unwilling to go there again. When I asked Mr Hosford Tanner how it could be that, there being no other opportunity to see their grandchildren, grandparents who I was being told were desperate to see their grandchildren were unwilling to see them in this way, there seemed to be no explanation. The father says that the Maternal family are socially of a far higher class than his and this is why they will not visit. Unimpressively, he was able to give me no indication of any efforts he had made to try to make it happen. Whatever may be the reason or combination of reasons for the fact that the children have not been seeing their maternal family, there are two features of it which are clear first is that it is to the children's detriment and second it is the adults who bear the responsibility for the fact that it hasn't happened.

30 Whilst the father was critical of the Mother for failure to send presents and cards to mark birthdays and Eid, pointing out several times that there are delivery services by which things may be sent to Libya, he was not able to explain how it is that he seems able to speak to the children reasonably regularly over digital platforms whereas the Mother's contact with them has been much more difficult and infrequent. He in fact suggested that he and the mother had been in similar positions in relation to contact. I do not accept that and I do not believe that he has made any real effort to ask the paternal grandfather to make sure that the children are made available to speak to their mother.

31 There was much in the father's evidence which was unsatisfactory. Even now he does not agree that the statement he prepared at the court's direction for use in the Libyan court so as to assist the mother there was wholly unsatisfactory. He has not acted as a father should in seeking to ensure his children have contact with their mother and maternal family. I was very unimpressed by the fact that he told me when I asked him that he had not asked his father why he had taken the children to the Libyan authorities and he appeared to have for some time no insight into why it was that Mrs Demery regarded him showing the children video recordings of marital disharmony as damaging to them. He only very belatedly accepted that was so. He appeared to me to have been unwilling to approach his father to see if he would assist in the children having a better opportunity to see their mother or to ask him to agree to lift the order for guardianship in the Libyan courts. Whilst he says now that the mother had been a neglectful and physically abusive parent, he had to accept he had never made any complaint about that to the authorities when living in England and I do not believe he can seriously believe it since he proposes that were the parents in the same country there should be a shared care arrangement which on his description of it has a broadly even division of time.

32 The Mother's evidence to me was that at the time just before the children left the UK she and the Father had been in discussions about taking a holiday. She had proposed Turkey instead of Libya which is what they had previously intended for the holiday and had taken the father's silence as agreement. She did not accept when challenged by the father that she had in fact been agreeable to the intention to take the children to Libya and that there had been discussion, but no plan made for Turkey. Whilst I found her evidence that they were going to holiday in Turkey and that was agreed rather than discussed unconvincing, and I also found perplexing the fact that she had gone there after a disagreement with the father leaving the children behind in his care assuming he would join her with them, I am satisfied that she had not agreed that the children should be taken to Libya still less that they should be left there with their paternal family.

33 The Mother told me, and I accept her evidence on this, that she has had very great difficulty having even indirect contact with the children. She has only been able to contact them via their aunt's phone and then infrequently. I am unclear why the children do not have sim cards in their own devices or their own ability to contact their mother but what is apparent on the evidence is that they have had more regular and more frequent contact with their father. She denied that she had been physically abusive to the children save that she had to accept that KC's allegation that he was hit after breaking a mobile phone was true. She also had no option but to accept the contents of the digital recording but said in effect that she had been provoked beyond endurance. It is my view that the recording gives a snapshot into the unhappiness within the home as the parents' relationship was breaking down and therefore a snapshot into the day to day lives of the children.

34 The Mother told me that she did not accept that the father will return to Libya saying that the father simply wants to 'win' this argument with her over the children but will himself go once he is able to travel to work in one of the Gulf states. Whilst the father has himself mentioned in evidence the possibility of opening another clinic in one of the Gulf states the evidence the mother has not produced evidence which supports her assertion that he will not return to Libya. There is in fact evidence to suggest that both parents were funded by the Libyan government for their studies with the effect that they must either (as contracted) return and work in dentistry for the Libyan state for a number of years or pay back the funding. I did not find the Mother's evidence that the father will not in any event return to Libya to be with the children convincing. I accept it is his intention to return there and would already have done so had he access to his passport.

35 In listening to the Mother's evidence and the submissions made on her behalf I formed the impression that whilst one cannot but feel enormous sympathy for the position in which she now finds herself, she has underestimated the difficulties of compelling children of this age to return to a country and to a life to which they have been explicitly clear they do not wish to return. Ms Demery has encapsulated the point when she observes that she thinks the mother will find the children now very different children from those who left her more than 2 years ago.

36 I have found this welfare decision for these children one which is not easy. Not least because there are significant detriments to weigh in the balance against the benefits of each. On balance however I have concluded that it is not in the Children's welfare interests to be returned contrary to their wishes – as I am satisfied it would be – from Libya. I accept that they are of an age and have a sufficient understanding of their situation that those wishes are to be accorded respect.

37 Their physical needs are well met in Libya, and I accept the view of Ms Demery on this despite the submissions made on behalf of the mother as to the unstable character of Libya as a whole. It is further evident on the reports contained in the trial bundle that educationally they are doing well and are happy at school. This compares with incidents of behaviour in the school in Sheffield which had caused the parents to be called into the school and at least some evidence of unhappiness and difficulties with other students for KC there. Whilst I am not comparing the educational prospects for them as I might were this an application for leave to remove, it is of relevance to consider the situation to which they are to be returning. I bear in mind also that KB is midway through her exam syllabus for IGCSE and whilst Mr Hosford-Tanner submits that with children of this age there may be no good time to move, I do not see that it is likely to be consistent with her welfare in terms of her educational needs to undertake a move midway

through her course. One of the things of which I have to take account is the effect of change on these children. Some change for them will be unavoidable. On either parent's case they will not continue to live in the home of their grandfather. Their day to day living arrangements will ultimately change for the better emotionally in the long term as they return to the care of a parent but I have no doubt that they will experience this as unsettling at least to begin with. Each parent is on the face of it able to care for them, as evidenced by the fact that each accepted before me that in the past there had been a degree of shared care ; the father accepted that he had when working in his Libyan dental clinic for 2 or 3 weeks at a time left them with their mother, and the Mother, when she went to Turkey thought nothing of leaving them in their father's care.

38 A return to the UK however will involve a far greater upheaval and disruption to their lives and I accept the assessment of the Cafcass officer that the effect on them is likely to be considerable and adverse. I agree also that they have suffered harm, whatever may be the extent of it, from their removal to Libya, from the prolonged period during which as these proceedings have continued they have been without the sollicitude of either parent and earlier during the unhappy period when their parents' marriage was breaking down. There is a likelihood of future emotional harm if they continue to be caught up in a cross-border dispute between their parents over where they should live. There is also as I see it a risk of future emotional harm were they by living in Libya to have no, or only the most limited, contact with their mother.

39 The removal to Libya by their father and their retention there by his family are actions which were without the consent of their Mother. Were the decision to be made one which reflected purely the rights and wrongs of the adult conduct then it would be a straightforward matter to determine that the children should return. There will be a clear expectation that that would ordinarily be the outcome where there has been a wrongful removal. This is however a welfare decision and the welfare on which I must focus is theirs. It is in the particular circumstances of this case and having regard to the particular welfare of these two children that I determine they should not be ordered to be returned against their wishes.

40 I recognise that if KB and KC remain in Libya, then it is very likely that their mother will not travel there to spend time with them. It is a matter of some sadness that they also recognise that and that the views they express that they do not wish to return are informed by that knowledge. I also recognise that whilst the Ambassador has assured me at this hearing that all possible would be done to enable the children to come to the UK to spend time with her, that the reservations which were expressed as to the need for those in Libya making such a trip possible, to be confident that they would come back may mean that I cannot be sure that such travel by the children would be authorised by those in Tripoli to whom the request would have to be made. I note of course the Ambassador's helpful advice that a request from the father would greatly assist. It also follows that I must recognise that just as, in the light of the expert evidence, any order I make for the children's return will not be enforceable in Libya neither will any order I make in respect of contact. It would however be very much my hope and expectation, given the assurances I have been given in good faith by the Ambassador and I have accepted in the spirit that they have been offered, that were there to be an order of this court for the children to have contact with their mother, all that reasonably can be done would be done to ensure that it would happen. This loss – or as it would be in the circumstances where the children have not seen their mother for more than 2 years a continuing loss- is one which I have weighed heavily in the balance. It carries with it inevitably emotional harm. I have nonetheless come to the conclusion that when I look holistically at the overall welfare of these two young people; when I consider the strength of their desire not to return to the UK

and the disruption and ongoing emotional difficulty which is likely to flow from directing that they should so return against their wishes, it would not be now more than 2 years on, in their interests so to direct and would cause greater emotional harm. I would reach that conclusion even without the knowledge that if I were to direct a return it would be to no effect if the Libyan authorities took a contrary view. As there is good reason to believe that they would. The fact however that something which Ms Demery observed to be causing ongoing difficulty for the children is the ongoing litigation and a lack of finality to the proceedings in which they have been caught up, only serves for me to underline the conclusion I have reached that it is not consistent with their welfare to direct a return.

41 It is with a heavy heart that after listening very carefully to all that has been advanced at this hearing that I have reached the conclusion I have. I have held in my mind as I have listened, the children's welfare. In the final analysis this is a welfare decision. Whilst it has been established that there is jurisdiction to direct that KC and KB should return – activating the 17th June 2021 order of Mr Justice Poole, I am satisfied that the balance falls when I consider their welfare on the contrary side.

42 It is my intention because I regard it as very much in the children's interests to have a continuing relationship with their mother even if (unless she returns to Libya) they will not be living with her, to make directions to ensure that there is contact between the children and their mother.

I will direct that the father is to make the children available for contact with their mother as follows:

- i) Should she be willing to travel to Libya to see them, on each occasion that she travels to Libya to include the opportunity for them to spend overnight time with her at the address at which she is staying whilst in Libya

And, once any travel ban on the children leaving Libya has been lifted :

- ii) At least one visit each year during school holidays for a trip of at least 14 days in the United Kingdom, the Father to use his best endeavours and take all reasonable steps to obtain visas and/or any permissions needed for them to travel. For the avoidance of doubt any contact in the United Kingdom is to be in addition to and not in substitution for any which may take place in Libya
- iii) In the event that it is not possible for the children to obtain any necessary visas/permissions to travel to the United Kingdom to see their mother, either at least one visit each year during school holidays for a trip of at least 14 days or two visits each year during school holidays for a trip on each occasion of at least 7 days to Turkey or another third country to be agreed between the parents.

43 I will also intend to make directions that the children are to have contact with their mother by telephone, whatsapp and/or digital platform or other digital means at least once each week. I have heard that indirect contact has been difficult and infrequent. I expect the father to make sure that changes. Such contact as there has been, has been via the paternal aunt's device. I cannot see why there should be any impediment for children of this age to have their own devices with their own sim cards. I will direct the father to use his best endeavours to ensure that they do – to include specifically that he asks his own father in writing to arrange it.

44 It is my intention to set aside the order of Mr Justice Poole for the return of the children. I will do so not, as the Father invites me to do by his application dated 12th August 2022, because he asserts there was a procedural irregularity in relation to the hearing before Mr Justice Poole – I have seen no evidence that there was any such thing. Rather I will set it aside on the basis of the circumstances as they are now and the welfare decision I have reached for the children more than a year after that order and more than 2 years after their removal.

45 Since I am sure that it is in the children’s best interests to have contact with their mother I will further direct that the Father is to use his best endeavours to procure the lifting of the travel ban. To the extent that that may include an approach to the paternal grandfather to join in any such effort the father is to do that. In the light of the ambassador’s indication that a letter from Father would be the most efficacious way of achieving that, the Father shall write to the court in Libya (and provide to the Ambassador (who is an intervener in these proceedings) and to the Mother a copy of the letter. The letter shall contain a) the request to lift the ban b) confirmation that the Father (as he has said to this court) recognises contact with the mother to be important for the children and wishes it to take place c) confirmation that this court has concluded that it would not be in the children’s welfare interests to direct a return to this jurisdiction in the expectation that all effort is made to ensure they have a continuing relationship with their mother including by direct contact d) the letter shall contain nothing which impugns the mother’s character in any way e) the Father shall, once the travel ban is lifted, ensure that the children are made available to spend time with their mother in the UK, Libya, or a 3rd country to which travel may be arranged.

46 I will further direct that a copy of this judgment , when finalised, is to be made available to the Ambassador and the Embassy of the State of Libya, whose assistance facilitating any necessary permissions and arrangements for travel and contact as indicated in this judgement to be in the interests of the children would be appreciated.

47 I will invite Counsel to draw up an order accordingly.