Neutral Citation Number: [2024] EWHC 555 (Fam)

Case No: FD23P00433 / FD23P00599

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2024

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

S	**Applicant**
- and -	
A	**Respondent**

- -

Re Y and K (Children: Summary Return Application: Asylum)

- -

Jacqueline Renton (instructed by **Goodman Ray** solicitors) for the **Applicant (father)**
Jonathan Evans (instructed by **Duncan Lewis** solicitors) for the **Respondent (mother)**

Hearing dates: 4-5 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 12 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE COBB

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

The Honourable Mr Justice Cobb :

Overview

1. On 10 August 2023, an Iranian born mother and her two infant children crossed the English Channel in a small boat; they were among a number of migrants that day aiming to gain entry to the United Kingdom without a visa or permission to enter. The boat in which the mother and children were travelling was intercepted by UK Border Force, and she and the children were taken to the asylum processing centre in Manston, Kent. For some weeks prior to her channel crossing, the mother had been on the move with the children across Europe from Germany. Their journey was undertaken without the knowledge or consent of the children's father; he remains in Germany.

2. When the father discovered that the mother had travelled to England, he issued (on 8 September 2023) an application in the Family Division under the Child Abduction and Custody Act 1985 (incorporating the Convention on the Civil Aspects of International Child Abduction of 25 October 1980 ("the 1980 Hague Convention")), seeking the summary return of the children to Germany. The mother indicated her opposition to that application, asserting (among other arguments) that the father did not possess 'rights of custody' (as a required pre-condition for a claim under the 1980 Hague Convention) in Germany. For reasons which I more fully discuss at §31 below, the father has now chosen not to pursue this application at the final hearing and I have given leave for him to withdraw it. He has instead pursued his later-issued application (30 November 2023) for the children's return to Germany under the court's inherent jurisdiction.

3. The mother and children currently have no international protection in this country as refugees. The mother's application for asylum was deemed inadmissible by the Secretary of State for the Home Department ('SSHD') on 3 November 2023. The mother has issued an application for judicial review of that decision, which is now at an early stage of its process. I address the issues relevant to this in a little more detail at §34 below. The mother is living in temporary accommodation, at an address not known to the father, with the children.

4. Given the welfare nature of the application under the inherent jurisdiction, and with the parallel judicial review proceedings in train, I occasioned enquiries to be made of Cafcass at the Pre-Trial Review ('PTR') last month as to whether they considered that the children should be joined as parties to the application. For completeness, I should make clear that the children had originally been joined as parties to the proceedings by Poole J on 27 September 2023 at a time when the mother's asylum claim was unresolved. Their joinder at that stage had been properly directed in accordance with paragraph 9 of Appendix 2 of the Practice Guidance Case Management and Mediation of International Child Abduction Proceedings of March 2023, ("the President's Practice Guidance: March 2023").

5. Following the refusal of the mother's application for asylum in November 2023, Moor J discharged the children as parties at a hearing in December 2023.

6. Cafcass responded to my recent renewed enquiry in this way:

> "… on balance, at this stage we do not consider that the children ought to again be joined to the proceedings whilst [the mother's] Judicial Review with respect to the refusal to grant her asylum is determined. This should, however, be kept under review".

Neither counsel has argued at the final hearing for the re-joinder of the children, which would (on Cafcass' further submission) necessitate an adjournment. It is acknowledged that there is a full welfare report from Cafcass, and the children's status in these and the concurrent proceedings in the Administrative Court is sufficiently well-understood to enable the final hearing to proceed.

7. Following the case management hearing in September 2023, the SSHD was invited to intervene in these proceedings; on 6 October 2023 she confirmed that she did not seek to do so. In February 2024, once the mother's application for judicial review had been issued, the SSHD was invited once again to consider intervening. He declined.

8. For the purposes of determining this application, a large bundle of evidence and other materials has been filed. I have received and read a helpful report (and addendum report) from Ms Catherine Callaghan of Cafcass (the Family Court Adviser). I heard brief oral evidence from Ms Callaghan. I have received written and oral submissions from counsel for the parties.

Legal Principles

9. Before turning to the facts, it is convenient to summarise some of the key legal principles which I have applied in reaching my decision. In relation to specific points discussed below (including the asylum claim), I have referenced other relevant authorities.

10. This application is to be determined by reference strictly to the children's welfare, which I treat as paramount. In considering their welfare, I have had regard – as far as it is possible to discern these factors on the papers – to their ascertainable wishes and feelings, their physical, emotional and educational needs, and the relative capabilities of the adults around them to meet those needs. I have had regard to the effect of change on them, and their own characteristics and background, including their ethnicity, culture and religion. In this case, I have of course paid close attention to the harm which they have suffered, or are at risk of suffering in the future: see generally in this regard section 1(3) Children Act 1989 ('CA 1989'). For the avoidance of doubt, although the proceedings before the court started life as an application under the 1980 Hague Convention, the specialist rules and concepts of that convention are of no relevance to this case now.

11. It is accepted by counsel that I have a broad discretion to decide the shape and/or extent of the welfare inquiry in a case of this kind, including the extent to which allegations of domestic abuse require investigation and determination (see *Re A and B (Summary Return: Non-Convention state)* [2022] EWCA Civ 1664: '*Re A & B*' at [66]). The key reference point in an application such as this is agreed to be the speech of Baroness Hale in *Re J (A Child)* (Custody Rights: Jurisdiction) [2005] UKHL 40. In the much more recent case of *J v J (Return to Non-Hague Convention Country)* [2021] EWHC 2412 (Fam) (which was referenced with approval by the Court of Appeal recently in *Re*

R and Y [2024] EWCA Civ 131 at [42]), I extracted from the speech of Baroness Hale the following eleven key quotes which are material in reaching conclusions in this case. I repeat them here, as they are very much to the point:

i) "… any court which is determining any question with respect to the upbringing of a child has had a statutory duty to regard the welfare of the child as its paramount consideration" [18];

ii) "There is no warrant, either in statute or authority, for the principles of The *Hague Convention* to be extended to countries which are not parties to it" [22];

iii) "…in all non-*Convention* cases, the courts have consistently held that they must act in accordance with the welfare of the individual child. If they do decide to return the child, that is because it is in his best interests to do so, not because the welfare principle has been superseded by some other consideration." [25];

iv) "… the court does have power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits. In a series of cases during the 1960s, these came to be known as 'kidnapping' cases." [26];

v) "Summary return should not be the automatic reaction to any and every unauthorised taking or keeping a child from his home country. On the other hand, summary return may very well be in the best interests of the individual child" [28];

vi) "… focus has to be on the individual child in the particular circumstances of the case" [29];

vii) "… the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case. What may be best for him in the long run may be different from what will be best for him in the short run. It should not be assumed, in this or any other case, that allowing a child to remain here while his future is decided here inevitably means that he will remain here for ever" [32];

viii) "One important variable … is the degree of connection of the child with each country. This is not to apply what has become the technical concept of habitual residence, but to ask in a common sense way with which country the child has the closer connection. What is his 'home' country? Factors such as his nationality, where he has lived for most of his life, his first language, his race or ethnicity, his religion, his culture, and his education so far will all come into this" [33];

ix) "Another closely related factor will be the length of time he has spent in each country. Uprooting a child from one environment and bringing him to a completely unfamiliar one, especially if this has been done clandestinely, may well not be in his best interests" [34];

x) "In a case where the choice lies between deciding the question here or deciding it in a foreign country, differences between the legal systems cannot be irrelevant. But their relevance will depend upon the facts of the individual case. If there is a genuine issue between the parents as to whether it is in the best interests of the child to live in this country or elsewhere, it must be relevant whether that issue is capable of being tried in the courts of the country to which he is to be returned" [39];

xi) "The effect of the decision upon the child's primary carer must also be relevant, although again not decisive." [40].

12. Baroness Hale encapsulated her views in this way:

> "These considerations should not stand in the way of a swift and unsentimental decision to return the child to his home country, even if that home country is very different from our own. But they may result in a decision that immediate return would not be appropriate, because the child's interests will be better served by allowing the dispute to be fought and decided here." [41]

13. I was further referred by counsel to the Supreme Court judgment in *Re NY (A Child)* [2019] UKSC 49 and to the eight linked questions posed by Lord Wilson in that case:

i) The court needs to consider whether the evidence before it is sufficiently up to date to enable it then to make the summary order ([56]);

ii) The court ought to consider the evidence and decide what if any findings it should make in order for the court to justify the summary order (esp. in relation to the child's habitual residence) ([57]);

iii) In order sufficiently to identify what the child's welfare required for the purposes of a summary order, an inquiry should be conducted into any or all of the aspects of welfare specified in *section 1(3)* of the *1989 Act*; a decision has to be taken on the individual facts as to how extensive that inquiry should be ([58]);

iv) In a case where domestic abuse is alleged, the court should consider whether in the light of *Practice Direction 12J*, an inquiry should be conducted into the disputed allegations made by one party of domestic abuse and, if so, how extensive that inquiry should be ([59]);

v) The court should consider whether it would be right to determine the summary return on the basis of welfare without at least rudimentary evidence about basic living arrangements for the child and carer ([60]);

vi) The court should consider whether it would benefit from oral evidence ([61]) and if so to what extent;

vii) The court should consider whether to obtain a Cafcass report ([62]): "and, if so, upon what aspects and to what extent";

viii) The court should consider whether it needs to make a comparison of the respective judicial systems in the competing countries – having regard to the speed with which the courts will be able to resolve matters, and whether there is an effective relocation jurisdiction in the other court ([63]).

Background history

14. This application concerns two children; they are Y, a girl aged five, and K, a boy aged two. The children and their parents are Iranian nationals. The father is now 37 years old; the mother is 35. The father is a musician and singer who has trained as an electrician. The mother has no paid employment.

15. The mother fled Iran in 2015, escaping (as she reports) pressure from her parents and wider family to marry a cousin against her will. She travelled to Turkey to join her sister who lived, and continues to live, in that country. While in Turkey, she worked in a stone-cutting factory, where she met the father who had left Iran some years earlier. From Turkey, they travelled together to Germany in 2016. They initially stayed in a refugee camp for several months before being provided with rented accommodation. The parties claimed asylum in Germany. They were separately interviewed by the German authorities in November 2016, and both parents confirmed that they were not married. The parents were both granted asylum in Germany in 2017, and they then established their home there. In 2019 Y was born, and in 2021 K was born.

16. In the first of his sworn statements in these proceedings (20 September 2023) the father claimed that the parents had been married in Iran in April 2014. He said this:

> "On 14 April 2014 we married in Iran but we both wanted to leave. Day to day life was difficult, restrictive and at times very frightening. We both felt Iran was a dangerous place to live and felt unable to raise a family there. In late 2015 we left Iran and travelled to Germany via Turkey."

This assertion had earlier been made by the father's solicitor in her statement of evidence in support of the without notice application for relief, plainly on the father's instructions.

17. In his second statement (16 November 2023), the father asserted again (and repeated in this document many times) that the parties were and "are married". He further repeated this assertion in his third statement (5 January 2024) and in his fourth statement (19 February 2024). He has nonetheless now accepted that the parties had not in fact even met while they lived in Iran, and that the earlier statement about the parties' marriage in Iran in 2014 was untrue, albeit that it was (he said) "not a deliberate lie … I did not really see any relevance in what happened over eight years ago."

18. It transpires that after Y's birth, in 2019, following an interview for eligibility for state benefits through the Federal Office for Refugees in Germany, the parties (or either of them) sought and obtained a marriage certificate from Iran purporting to reflect the existence of the marriage. There is a conflict of evidence around this, but it seems likely (given the father's enduring adherence to the claim of marital status) that the father was the main architect of the plan and the prime mover. It was in these circumstances that the parties registered their 'marriage' with the German authorities in October 2019. As

I said above (§17), it is now accepted by the father that the parties never actually went through a ceremony of marriage in Iran; his case is that: "in order to be married you did not have to have a ceremony as such". He says:

> "The marriage certificate refers to the date of our marriage as 14 April 2014. That did not reflect the reality as we had not even met then but [the mother] and [the mother's father] wanted to ensure the period of our relationship when we were cohabiting and together (2015-2019) out of wedlock to be made legitimate in the eyes of our religion".

19. The mother contends that the marriage certificate was obtained "fraudulently" in 2019, and denies any input from her; she says that the certificate was obtained without the knowledge of either her father or her wider family as alleged by the father. She points to the fact that her status in Iran has recently been confirmed (by a translated document filed with the court from the Iranian National Organisation for Registration of Deeds and Properties: 17 October 2023) to be as a 'single' person. She disputes that a marriage could have been achieved 'retrospectively'. She further states that by the time the marriage was allegedly registered in Iran (2019), she and the father had converted to Christianity and had been baptised in that faith in Germany. The mother nonetheless accepts that she was to some extent complicit in the lie to the German authorities about the parties' status, albeit (she says) that her conduct must be seen in the context of her coercive relationship with the father (see §21 below).

20. It is not necessary for me to make specific findings about the circumstances in which the marriage certificate was generated in Iran, given that the father has withdrawn his 1980 Hague Convention application and 'rights of custody' are no longer in issue. Whatever the precise truth, the agreed evidence of the parties now is that they did not know each other in 2014, were certainly not married in Iran in that year, nor did they leave Iran together in 2015 – all of which the father had originally claimed. Against that background it is notable that:

    i) As recently as 16 November 2023, the father (through lawyers in Iran) has submitted a formal petition to the Iranian Court (the Shiraz Family Court, Fars Province) seeking 'proof of marriage' "on behalf of (sic.) [the mother]";

    ii) In the petition to the Iranian Court (16 November 2023), the father declared his marital status to be "married";

    iii) In respect of that petition, a hearing took place in the Shiraz Family Court on 26 February 2024. I have seen a notice of hearing which indicates that the court would be considering "the date of the marriage and the amount of the client's dowry", but at the time of this judgment, I am unaware of the outcome of this hearing;

    iv) In his application for relief in this Court under the inherent jurisdiction dated 30 November 2023 (issued only when the mother challenged the existence of the marriage), the father expressly stated as follows: "the Respondent mother contends that [the parties] are not married and that this [2019] marriage certificate is fraudulent. This is not accepted by the father".

21. It is the mother's case that the father was abusive to her during their relationship, physically, emotionally and financially. The witness statements on both sides are replete with detailed allegations, denials and cross-allegations in this regard. On occasions (in 2020 and 2022), the police were involved in investigating allegations of domestic abuse. In 2020 the police recorded suspected offences of "aggravated battery, malicious actual bodily harm" against the mother by the father; the mother on that occasion was observed to be "very intimidated and unsettled". The mother had then alleged to the police that "since the start of their marriage (sic.) the [mother] was repeatedly and regularly beaten by the [father] and kicked while he was wearing shoes". In 2022, the police investigated further allegations of abuse; on this occasion they photographed the mother's injuries which had allegedly been caused by the father. A photograph in the documents filed on this application show the mother with significant facial bruising. It is said that the police on each occasion required the father to stay away from the home for ten days; it is her case that this was not effective to curb his behaviour, and in any event he did not comply.

22. The mother alleges that the father was physically and emotionally abusive also to Y; she says that the father squeezed Y's leg and hand and grabbed her by the neck. The mother states that the father twisted Y's leg, arms and ear if she annoyed him, and on multiple occasions the father assaulted the mother in front of Y. The mother asserts that Y was severely impacted by the abuse she experienced and was referred for counselling while the family were living in Germany; she was further subject to a paediatric assessment. Surprisingly in the circumstances the father told the Family Court Adviser that Y did not have any behavioural difficulties at kindergarten ("no concerns"). The Youth Welfare Office ('YWO') in Germany was apparently aware of the serious allegations of domestic abuse from 2020; the YWO recorded the mother's concerns about the welfare of her children (see §65 below). Her assessment is that the YWO was ineffectual and even undermining of her vulnerable position and sought to promote regular, unsupervised and overnight contact between the father and children.

23. A detailed schedule of allegations of abuse in its multiple forms has been lodged with the court on this application; I do not propose to rehearse its contents here. The father's acceptance of the allegations is limited to occurrences of verbal arguments between him and the mother (see further §47 below).

24. The parents separated in August 2022. At that time, Y was 3 years old and K was merely 9 months old. Following their separation, the father saw the children weekly and then fortnightly. No sustainable contact arrangement was established, in spite of a written agreement. It is the mother's case that the father continued his campaign of abuse against her, which he denies; the mother is reported to have breached contact arrangements set up by the YWO.

25. In mid-April 2023, the mother left her home in Germany with the children following (she maintains) a further alleged serious incident of physical abuse of her by the father at her home following an unsolicited visit. The mother travelled to France. Her case is that she spent almost four months in and around refugee camps in northern France, and that she and the children occasionally slept on the streets. In this period, she alleges that she was raped at least once. The mother says that she did not initially plan to travel to England, but had learned that the father had travelled to northern France searching for her and was fearful for her safety; he confirms that he did indeed travel to Calais searching for her and the children. She considered that England would be safer for

herself and the children. She did not have any passports or travel documents, and was offered the chance of a 'small boat' crossing.

26. On 10 August 2023 she and the children made the crossing to England. She says that she paid an Iranian acquaintance €6,000 in cash for the passage. On arrival in England, the mother and children were provided with shelter in an asylum hotel in the north of England; she was granted immigration bail on 12th August 2023. In or about December 2023 the mother and children were moved from the hotel to her current accommodation (the location is known to the court, but is unknown to the father). She has no security of tenure of her current home; she is said (by the Family Court Adviser) to be "isolated" where she lives. It seems likely that she will soon have to move once again.

27. In August 2023, the mother applied for asylum for herself and the children (or made a humanitarian protection claim deemed to be an application for asylum). She attended a screening interview, albeit she was unrepresented and spoke (and speaks) little English. Once it was known that the father had made an application under the 1980 Hague Convention, the asylum claims were helpfully referred for expedited consideration, in accordance with the SSHD's operational instruction. On 3 November 2023, the mother's application was deemed 'inadmissible' by the SSHD on the basis that she was a 'national' of an EU country (Germany) (see section 80A and section 80AA of the Nationality, Immigration and Asylum Act 2002 ('the NIAA 2002')). I note that at the head of the SSHD's letter, the mother's nationality was in fact recorded as "Iran (Islamic Republic of)", and the word 'Iran' is set out alongside the names of the dependant children. As the SSHD's decision was not a refusal of the mother's claim, she had no right of appeal under section 82(1)(a)/(b) NIAA 2002.

28. On 31 January 2024, the mother initiated judicial review proceedings in relation to that decision (see §34 below). The mother properly issued a concurrent application on form N463 indicating the urgent nature of her claim. The application is currently being processed by the Administrative Court. It is at an early stage; an acknowledgement of service and summary grounds of defence have been lodged.

29. The father has not spoken to or seen the children since the first weekend of April 2023. Almost as soon as the father realised that the children had left their home, he issued an application in his local family court in Germany seeking defined contact with the children; this was done on 20 April 2023. On 17 May 2023, he applied for 'sole custody' of the children. The children were joined to the proceedings to be represented by a court-appointed guardian.

30. The evidence reveals that the mother and the children currently hold valid German Residency documentation and German issued Refugee Travel Documents until at least March 2026.

The application under the 1980 Hague Convention

31. As I have indicated above, (see §18), in or about 2019 the parties or either of them falsely represented to the German authorities that they had been married in Iran in April 2014; they were registered as married on the German Civil Register. The father has, as I have mentioned above, repeated this claim in these proceedings many times. It is now accepted that the parties were not married in Iran in 2014.

32. At the outset of these proceedings, the father relied upon his entry in the German Civil Status register as a 'married person' to establish his 'rights of custody' under Article 3(a)/(b) of the 1980 Hague Convention. At the pre-trial review on 22 February 2023, I raised a concern with the father's legal team that the father's 'rights of custody' would at best be somewhat insecurely founded upon an apparent fiction that he was a married father. On specific enquiry of the German law expert who had advised in these proceedings on these and other issues, I was advised that the mother could seek the correction of the Civil Status Register; the process by which it could be corrected was explained. The expert added (in her further opinion, in answer to a question posed by me at the PTR): "the correction of the register would act retrospectively, so it would have the effect of the parties never having been married under German law".

33. Following the pre-trial review, the father indicated that he would no longer pursue his application under the 1980 Hague Convention, and at the final hearing I gave him leave to withdraw the application.

The mother's protection and asylum claim; judicial review; summary return

34. Although the mother no longer has an outstanding protection claim under the Immigration Rules, the principles and procedure which are clearly laid out in Appendix 2 of the President's Practice Guidance: March 2023 (and the Senior President of Tribunal's Guidance issued simultaneously) apply to this application, in my judgment, without material adaptation. These guidance documents follow the Supreme Court's decision in *G v G* [2021] UKSC 9 (see especially [162]-[170]). Case management directions and other orders made throughout this process have sensibly incorporated the provisions helpfully laid out clearly in the standard template order (order 13.31)[1].

35. The mother's judicial review claim issued on 31 January 2024, appears to be based upon three arguments:

    i) That the asylum claim has been wrongly treated as "inadmissible"; the mother is not and never has been an EU national;

    ii) The mother meets the test for 'exceptional circumstances' under section 80A(4) NIAA 2002; the SSHD did not consider this;

    iii) The evidence showed that the mother was/is the victim of trafficking; she was not properly identified as a potential victim of trafficking, and was not referred to the National Referral Mechanism for an assessment.

36. The SSHD has confirmed that the asylum claim was treated as "inadmissible" on the basis that the mother had allegedly claimed at her screening interview to "hold German citizenship since 2016", and had "German ID documents". In a more recent response (15 January 2024) to the Pre-Application Protocol letter, it has been said on behalf of the SSHD that:

> "… the SSHD does not intend to reconsider this decision at this stage, but should an explanation be provided for the

[1] Order 13.31 - Abduction - Concurrent Asylum Claim - First Directions (On Notice).

> above admission, and/or abovementioned documents requested be submitted, the SSHD may review this matter".

37. It is the father's case that the judicial review application is merely strategic and is designed to 'filibuster' the otherwise normal progression of the father's application for a summary return of the children (see the general concerns expressed by Lord Stephens in this regard in *G v G* at [3]).

38. Documents have been helpfully disclosed into these proceedings from the SSHD's files and from the judicial review proceedings in accordance with the principles set out in *Re H (A Child) (Disclosure of Asylum Documents)* [2020] EWCA Civ 1001, [2021] 1 FLR 586, and within the procedural framework provided by FPR 2010 r 21.3. As mentioned above, the children were joined while the mother's protection claim was being considered (para.9 of Appendix 2 of the President's Practice Guidance March 2023).

39. Without in any sense seeking to cut across the President's Practice Guidance: March 2023 and the Senior President of Tribunal's Guidance, experience in this case has revealed that it would be useful for an applicant in Administrative Court proceedings linked to summary return proceedings (1980 Hague Convention or inherent jurisdiction) to take the following steps on issue of proceedings in the Administrative Court:

    i) Make an application within the Administrative Court proceedings for such directions as are necessary for the purpose of ensuring that the claim commenced in that court is decided either with or in parallel with proceedings in the Family Division;

    ii) Where possible, seek to agree the initial case management directions necessary in the Administrative Court proceedings with the other party(ies) to those proceedings;

    iii) Make an application for directions in the Administrative Court promptly. If a decision on the application for directions is needed within seven days, the application should be made using Form N463 (the "immediates" applications procedure – see CPR PD54B) (in fairness, the mother's solicitors did this in this case: see §28 above). If a decision on the application can be made in slower time, the application should be made on Form N244, but the applicant should state on the application notice and in the covering letter/email that the Administrative Court claim is linked to proceedings in the Family Division, and any time constraints applying to the Family Division proceedings should be flagged;

    iv) When making an application to the Administrative Court, the applicant should also (a) state the name of the Family Division judge who is dealing with the family proceedings (if known); and (b) request that the application be brought to the attention of the Judge in Charge of the Administrative Court (currently Swift J). This will facilitate useful collaboration between the Divisions.

Cafcass enquiries

40. Ms Callaghan of Cafcass has made enquiries on behalf of the court. She has prepared a substantive report, and an addendum report. She gave brief oral evidence before me. She has met the children twice (October 2023 and February 2024).

41. The Family Court Adviser reported that:

> "…prior to April 2023, [K] and [Y]'s life in [Germany] was stable in respect of them having a secure home and having the opportunity to spend time with their father, with [Y] attending nursery and having started the process of having a developmental assessment".

42. She describes Y, from her recent visit, as "having settled into school life (in the 8 weeks or so since January 2024) well". Significantly, "Y is reported to be calm and settled", and "her attendance is excellent". It is said that "she goes into school confidently without any problem". The Family Court Adviser reports that Y is "making friends with the other children". Y is however currently 'selectively mute'; it is said that "the school are not overly worried at this point" about this issue, although it will be monitored.

43. The Family Court Adviser advised that the children have achieved a degree of stability living with their mother since their arrival in the UK, and that:

> "[Y] and [K] would wish to remain in their mother's care" … "[the mother] has always been [Y]'s and [K]'s primary carer and there is clearly a bond between the children and their mother. Whilst they were born in Germany, due to their young ages [Y] and [K] had yet to become fully integrated into the community. [Y] had started nursery school however had only attended for a short period. It is eighteen months since the children lived in the same home as their father and almost a year since they last spent time with him. Since that time [Y] and [K] have had a great deal of disruption, and according to [the mother]'s description of her experiences, the children have undoubtedly faced danger after leaving Germany and during their journey to the UK".

44. The Family Court Adviser asked a number of questions of Y in the company of her mother. When Y was asked about her father:

> "… [Y] stopped playing and looked alarmed and started shaking her head. I then observed [Y] move her hand toward her face, as if to hit herself and then she moved towards her mother, as if to hit [the mother]. [Y] then put her hands round her mother's neck and said baba ['father']. This response from [Y] did not appear to have a rehearsed quality as her actions were spontaneous upon hearing her father's name and there was no hesitation or glances towards her mother".

45. The Family Court Adviser reported on the mother's fears that if the children were returned to Germany the father would remove them from her care and take them to Iran.

She recommended that "robust" protective measures would be needed in the event of a return. She made no firm recommendation in her report as to outcome but expressed the clear opinion that:

> "… should the children's return to Germany be directed, or be required due to their immigration status in the UK, there should be no direct spending time arrangements implemented between the children and their father until a welfare and risk assessment are undertaken".

46. In conversation with the father, the Family Court Adviser reported that he denied that Y had displayed any behavioural difficulties while in kindergarten in Germany (see above), and that the kindergarten had 'no concerns'. This is in direct contradiction to the evidence which the father's solicitors had obtained from Germany:

> "… on the 13.01.2023 a telephone conversation took place with the management of the nursery which [Y]'s behaviour (outbreaks of anger, motor restlessness and oppositional behaviour) were described, as well as the turbulent relationship between [the father] and [the mother]… In view of the behavioural difficulties, the nursery in conjunction with [the mother] discussed a referral to the Sozialpädiatrische Zentrum (Socio-Paediatric centre) for diagnostic purposes." (Emphasis by underlining added).

Allegations of domestic abuse; protective measures

47. As will be apparent from my rehearsal of the background history above, the mother has made a wide range of allegations of abuse against the father. At the PTR, it was agreed between the parties with my approval (and recorded on the order) that the allegations did not require adjudication at this hearing and that:

> "…in respect of the mother's allegations of domestic abuse, the court shall proceed on the basis that the mother's allegations are true, and then consider the adequacy of the protective measures proposed by the father. As such, there shall be no oral evidence by way of fact finding in relation to domestic abuse."

This approach is entirely faithful to the provisions of PD12J FPR 2010 (para.5, and 16-18), which provides that an adjudication of disputed allegations of domestic abuse should be directed where this would be 'relevant' to a decision on whether to make the order, and 'necessary' to provide a factual basis for the court's determination on welfare, or to provide a basis for an accurate assessment of risk.

48. This agreement was reached in the knowledge that the Family Court Adviser (having used the Cafcass Domestic Abuse Practice Pathway) had commented that if the mother's allegations are true:

> "… [the father] presents a high risk to the children and their mother of perpetrating domestic abuse. Whilst [the mother]

> did report violence from [the father] to the police in Germany on two occasions, she reports that her fear or repercussions from [the father] prevented her from pursuing those allegations and from disclosing abuse by him towards [Y]. Furthermore, [the mother] has spoken to me of her fear for [K]'s and [Y]'s safety when spending time with her father as he is quick to become angry and he has threatened to remove them from her and take them to Iran".

49. As the judgment in the recent decision of *Re T (Abduction: Protective Measures: Agreement to Return)* [2023] EWCA Civ 1415 makes clear, it is important when reviewing an application for a summary return particularly against a backdrop of alleged abuse, for the court to satisfy itself that the proposed protective measures would indeed be indeed effective to address the potential harm ([50]: "Protective Measures need to be what they say they are, namely, *protective*. To be protective, they need to be *effective*": Emphasis by italics in the original). In this case, unlike *Re T*, the country to which the children would be returned is a signatory to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("the 1996 Hague Convention"), and steps can therefore be taken (Article 11 ibid) to enforce these.

50. Counsel has prepared, at my request, an extremely useful two-column table setting out the proposed protective measures (thirteen in total); this offers a side-by-side précis of both parties' positions in relation to each proposal. I commend the preparation of such a table in each case where protective measures are in issue. Perhaps because of the ease of analysis in the way in which the information was presented, there emerged a broad measure of agreement about the proposed protective measures. I note, for instance, that the father has agreed to pay for return flights for the mother and children, and that he will not attend the airport on their return; he has offered to submit to non-molestation and exclusion injunctions. There is an important agreement that the father will not seek to remove the children from the mother's care or seek contact with the children until the court in Germany has adjudicated on each issue, and that a court hearing will not be listed within 6 weeks of the children's return; both parties agree not to remove the children from Germany. There is agreement about the retention of key travel documents, and in relation to the obtaining of a mirror order in Germany.

51. However, there are differences between the parties in relation to proposed protective measures in the following respects:

    i) The father has indicated that he will not support any criminal prosecution of the mother for abduction; the father has provided a translated document which purports to be a notice to the Director of Criminal Investigation withdrawing his criminal complaint in this regard. The mother is nonetheless not satisfied that she would not face prosecution if she were to return; the withdrawal of the complaint does not conclusively determine that she will not be prosecuted. I was referred to MacDonald J's judgment in *H v K* [2018] 1 FLR 700 in this regard; he observed that the risk of the abducting parent being arrested and prosecuted for child abduction is not sufficient by itself to satisfy Article 13(b) of the 1980 Hague Convention (see [44]) and that (in a 1980 Hague Convention case anyway):

> "[56]… the court seeking to enforce the return of the child, and thereby maintain fidelity to an international instrument designed to discourage and prevent child abduction, has no business trying to protect the abducting parent from arrest and prosecution upon their return under domestic laws designed to achieve precisely the same end";

ii) The father makes no firm proposal in relation to accommodation for the mother and children on their return; he suggests that the mother will need to obtain unspecified state "emergency accommodation" or accommodation arranged by a charity. The mother would wish to be able to return to furnished private rented accommodation in Germany (of a type similar to that which she left in April 2023); she requests that the father provides funds upfront to cover the deposit and 6 months rent (at €800pm) for such accommodation. Although, prior to April 2023, the mother's accommodation was in the main funded by housing benefit in Germany, this source of support is no longer assured;

iii) The father offers €200pm by way of child maintenance; this is about one-half of the rate at which he was supposed to be paying maintenance before the mother left Germany in April 2023 (although she says that he never in fact paid maintenance). The mother seeks €400pm child maintenance at least until there has been an assessment by the German equivalent of the Child Maintenance Service;

iv) The father makes no offer in relation to financial support for the mother; she seeks an additional €500pm to cover the basic costs of utilities etc.

52. I should add that although the father denies that he had perpetrated domestic abuse on the mother, he would be prepared to attend a domestic abuse programme if the court considered that necessary.

The arguments

53. The father argues that I should return the children to Germany, their home country, forthwith; he asserts that it is plainly in their interests that I do so. On his behalf, Ms Renton points to the fact that the mother removed the children from Germany in a unilateral and clandestine way, and without reference to him. Until that point, it is agreed that the children had lived their whole lives in Germany and were habitually resident there; they had no connection with England at all. It is the father's case that prior to their removal, the children had a stable life in Germany – they had a secure home, a relationship with their father, Y was in nursery, and she had started the process of a developmental assessment.

54. Ms Renton referenced the existence of the proceedings in the Family Court in Germany, launched after the departure of the mother and children; in those proceedings, a Guardian has been appointed for the children. She pointed to the fact that the YWO had assisted the parties in reaching agreement regarding contact arrangements.

55. Ms Renton further points to the considerable instability of the children's lives in England. They have now lived in two different places – an asylum hotel in the north of England until December 2023, and then onto alternative accommodation (where they

currently live). There is a probability of a further move. Y has been in two different schools. Currently Y is not receiving any therapeutic or other support in relation to her mutism or other trauma whereas in Germany, a developmental assessment was underway at the time of their departure. It is pointed out that there is no family support in England for the family. The children are very young, and were having regular contact time with F, prior to their abduction;

56. The father makes a powerful point that if the children remain in England he will have no, or no meaningful, opportunity to see them. It is the father's case that if the children are returned to Germany, he would like the children to live with him.

57. Mr Evans, for the mother, emphasised that the mother fled extreme violence in Germany at the hands of the father; he has understandably approached his submission on the basis that this court will treat the allegations made by the mother as essentially true for this purpose, with the focus being on the proposed protective measures. As to which, Mr Evans focuses on the shortcomings in the package of measures which, he argues, will leave the mother and children unacceptably exposed. The mother has no home in Germany nor any prospect of anything other than 'emergency' accommodation; she has no family there; she has limited access to the court system; she will have insufficient funds for herself and the children to survive; she does not speak more than rudimentary German. It is his case that the dangerous nature of the journey which she took with the children to flee from the father and her abuse in Germany reflects the intolerable situation in which she was living in Germany, in close proximity to the father and it would be unconscionable to return them.

58. The description of Y's spontaneous and unrehearsed reaction to mention of her father is evidence, says Mr Evans, of the trauma which Y still carries as a result of what she saw of her father's conduct to her mother.

59. Mr Evans urges me to place no confidence in the father to adhere to the protective measures offered; he has shown himself to be unreliable and untrustworthy. He has continued to lie to a number of responsible authorities, including this court, about his marital status.

Discussion

60. As I discussed in some detail above, this application for a summary return of the children to Germany is to be determined according to the children's best interests. In reaching a conclusion I have had regard to the welfare checklist in section 1(3) CA 1989. In my judgment, the decision is, in fact, finely balanced.

61. These two young children are on any view extraordinarily vulnerable. They have far greater needs than most children of their ages. I am wholly satisfied, from what I have read, that they are likely to have suffered a range of significant traumas in their young lives. In this 'best interests' determination, there is no obvious solution. Faithful to the guidance of Baroness Hale, (see [29] in *Re J*) I have sought to focus on these individual children, Y and K, in the particular circumstances of this very troubling case at the present time.

62. In reviewing this application in the round, I have proceeded, as has been agreed between the parties, on the basis that the allegations of domestic abuse by the father on the

mother and Y, in its many forms, are likely to be true. Y's reaction to discussion of her father (observed by the Family Court Adviser) lends some credence to the mother's account that her daughter had indeed been exposed to the abuse; it was the Family Court Adviser's view that "[Y] would have been anxious for much of the time" while in the care of her mother and father. There can be little doubt that the trauma of life in what appears to have been an abusive household would have been materially exacerbated for Y (as for the mother) by the experiences of the long, difficult, and extremely dangerous journey from Germany to England over a number of months in 2023, culminating in the perilous cross-channel voyage. I agree with the Family Court Adviser that the long and arduous journey to England must have been "terrifying" for Y.

63. The mother is extremely vulnerable too. Her situation, and the options for her future, offer no clear solution. She has no family in Germany, and no family in England. She has little, if any, support in Germany; she has little, if any, support in England. She speaks only rudimentary German and very little English. She has relinquished her accommodation in Germany, and were she to return there it appears that she would be allocated emergency accommodation at best; she has no secure accommodation in England and faces a probable further move in this country. It is common ground that the family lived a financially modest life while they were all in Germany; the father's proposal for financial support in the event that the mother returns contemplates much reduced provision for the children from him. It is apparent that in England the mother is currently financially in a similar (albeit marginally worse) situation than when she was living in Germany in 2023. The Family Court Adviser referred to the mother as somewhat 'isolated' currently in this country; the father himself reported in 2020 and again in 2022 that the mother was 'isolated' while living in Germany – he told the YWO that the mother's social isolation in Germany "was putting a strain on her psyche" and causing her "stress".

64. The mother has an uncertain immigration future in England; she appears to have a more secure, albeit time-limited, immigration status in Germany.

65. Whatever the objective reality, it is the mother's perception that the German authorities were ineffectual in protecting her from the domestic abuse of the father. The mother expresses dismay that the YWO sought to promote unsupervised increasing (including overnight) contact for the father with the children, notwithstanding her well-documented complaints about his repeated abusive conduct towards her and the children; the Family Court Adviser reports that the YWO's approach to what it referred to as parental conflict was "for this to be dealt with through mediation, individual and joint sessions at a counselling centre". The mother points to the apparently surprising observation of the YWO in early 2023 (in the context of counselling sessions in Germany) that "[the mother] always emphasised that she was very worried about her children. From our perspective, this cannot be fully understood" (cited in the Family Court Adviser's report). While it is clear that on at least two occasions the police investigated the mother's allegations of abuse, she felt that the police took no effective steps to protect her and the children, simply excluding the father from the home on each occasion for ten days. Her lack of confidence in the ability or willingness of the authorities in Germany to protect her and the children from a repeat of the abuse she had earlier suffered would, in my judgment, materially impact on her personal emotional well-being and on her capabilities as a mother should she return.

66. The children's situation is plainly currently unsatisfactory in this country; it is, or would be, unsatisfactory were they to be returned to Germany. I nonetheless recognise that the mother currently derives an important sense of personal security from being in this country and away from the father at present, and it is notable that the children "appear to be well cared for in difficult circumstances" (Family Court Adviser). The mother and children have accommodation in this country albeit it is temporary; were they to return to Germany they would be not be returning to much that would be familiar and certainly would not be returning to their former 'home'. The mother is reported to have been able to access various forms of support from the agencies in the area where she and the children are currently living. It is highly material to my consideration that Y is now described by her current school as "calm and settled" (see §42 above), and a "confident" attender. K is now attending a nursery. The Family Court Adviser refers to the children as having acquired "a degree of stability" in this country by the time she saw them with their mother in February 2024.

67. I acknowledge that the father will experience increased difficulties in achieving meaningful face-to-face contact with the children if they remain in England, at least in the short term; I am conscious of the importance of achieving contact between a child and their parent where it is safe for the child for this to occur. However, I am far from sure that Y is yet ready to see her father again, at least not without some very careful preparation of Y, and probably some domestic abuse perpetrator work with the father (which he has offered to undergo). Y's presentation, when mimicking acts of domestic abuse in response to her father's name being raised in conversation, appears to me to reflect strong negative associations with him in her mind. The Family Court Adviser was circumspect about the re-introduction of contact between the father and the children at this stage ("there should be no direct spending time arrangements implemented between the children and their father until a welfare and risk assessment are undertaken"), and advised that only supervised contact could be considered in any event.

68. Y's current mutism, believed by her school and her mother to be 'selective', represents, in my judgment, a particular cause for concern. While I take a degree of reassurance from the fact that Y's school appears not to be 'greatly troubled' about it (and they know her reasonably well), I nonetheless hope that this will be professionally and expertly investigated at the right time, possibly as a matter of some priority. I am concerned that this is a manifestation of her trauma and/or distress, for which she could or should receive some help. I am aware that Y was being assessed in Germany by a paediatric developmental consultant, but there is no evidence that a re-referral could be any more quickly reinstated for examination of this issue in Germany than a referral in this country. I have a concern that in returning Y to Germany, to an environment which was for present purposes accepted to have been abusive, and in the care of a mother whose emotional state would I am sure be exceedingly fragile, this may in itself compound the evident traumas experienced by Y.

69. The protective measures go a long way to offer reassurance to me about the situation for the children should they be returned; the father deserves credit for stepping up to meet the concerns of the mother and the needs of the children in these respects. That said, the areas in which there remain differences between the parents are not insignificant. The mother is I find genuinely fearful of the risk of prosecution; I am satisfied that the father has taken the steps available to him to withdraw the criminal

complaint, but this may well do little to assuage the mother's anxiety that she will not face criminal penalty and will play upon her mind if she returns, adding to her already high levels of anxiety. It seems likely that the father's meagre financial support for the children will impact directly on the mother's ability to meet their physical needs; a return to Germany is likely to lead to several moves of emergency and temporary home for the children. Moreover, and generally, I harbour doubts about the father's good faith in offering these measures as a means to secure the children's return; while protective orders can of course be made here (which would be effective temporarily in Germany) under the 1996 Hague Convention, it is a source of considerable concern to me that the father appears, even as recently as last week, to be pursuing a wholly false claim in the Iranian court that the parties were indeed married in that country in April 2014. I am troubled that he is doing so in order to attempt to secure some legal advantage over the mother (rights of custody or otherwise) in Germany.

70. I have of course borne much in mind that the children were habitually resident in Germany prior to April 2023. I am also conscious that there are German proceedings in train; it seems to me that that the German Court may regard itself as properly seised under Article 5 of the 1996 Hague Convention, rather than under the less secure basis of Article 7 as suggested initially by Ms Renton. But there are clear mechanisms under the 1996 Hague Convention for the proceedings to be transferred to this country in the event that the German Court considers that this court is "better placed" (Article 8 or 9 ibid.) to deal with them. It seems likely that the mother would have linguistic and practical difficulties in pursuing or defending child arrangements applications in the German court; in this country she would have the benefit of continuity of legal representation. While I am unclear as to the availability of public funds for family litigation in Germany, I am confident that the father would also have the benefit of non-means, non-merit tested legal aid to pursue an application for contact with his children under Article 21 of the 1996 Hague Convention in this country. And, insofar as the father may feel any sense of disadvantage in litigating here, he should derive some comfort from what Baroness Hale said in *Re J* at [41]:

> "Our concept of child welfare is quite capable of taking cultural and religious factors into account in deciding how a child should be brought up. It also gives great weight to the child's need for a meaningful relationship with both his parents."

71. Having considered the evidence and the submissions counsel, I have been left in little doubt that were it not for the mother's extreme distress with her situation in Germany she would not have uprooted herself and the children in the manner in which she did; it is a further mark of her desperation that she embarked on the treacherous route of crossing the channel in a wholly unsafe way, putting her life and the lives of her much-loved children at risk. I am sure that if I ordered the return of the children to Germany now, she would feel compelled to return with them; I am equally sure that her 'capability' (section 1(3)(f) CA 1989) as a parent to them in the short to medium term would in those circumstances be materially compromised. This would be significantly to their detriment. Emotionally the mother would, I suspect, be unable to offer the children the level of maternal care to which they have been accustomed throughout their short lives thus far, and which they currently so desperately need.

72. For these reasons I have concluded, on balance, that it would not be in the best interests of these two children that they are, at this point, returned to Germany. I am not assuming (and nor should the father) that by allowing the children to remain in England while their longer-term futures are decided, that it inevitably means that they will remain here for ever. In reaching my conclusion, I am also conscious that future decisions about the immigration status of the mother and children, and their right to remain in England, may not in the end coincide with this welfare-based decision.

73. I propose therefore to dismiss the father's application. I invite counsel to draw up the order which reflects this decision, and seek to agree any directions for disclosure of evidence and/or other materials into the Administrative Court proceedings.

[End]