



Neutral Citation Number: [2023] EWFC 227

Case No: MK23P00043

IN THE FAMILY COURT AT MILTON KEYNES

Date: 8 December 2023

Before:

Paul Bowen KC (sitting as a Deputy Judge of the High Court)

Between:

A father

Applicant

- and -

A mother

Respondent

**Re. HTD and HTE (Children) (Temporary Removal from jurisdiction) (Malaysia
and Hong Kong)**

The Applicant appeared in person
Ms. Niamh Daly (instructed by Horsey Lightly, Solicitors) appeared for the Respondent

Hearing dates: 30 November – 1 December 2023, 8 December 2023

APPROVED JUDGMENT

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.

Paul Bowen KC (sitting as a Deputy Judge of the High Court)

1. This is a private law matter concerning the child arrangements to be made for two young children, HTD (a girl, aged 4 years and 3 months) and HTE (a boy, aged 15 months) ('the children'), following the breakdown of their parents' relationship. There are before me two applications for final hearing. The father seeks a child arrangements order under s 8 of the Children Act 1989 ('the 1989 Act') for a shared (50/50) 'live with' order. The mother opposes that application and proposes that the children live with her and spend time with the father, but less than 50% (together 'the child arrangements applications'). The father also seeks a prohibited steps order under s 8 of the 1989 Act forbidding the mother to remove the children from the United Kingdom. The mother opposes that order and seeks a specific issue order under s 8 of the 1989 Act permitting her to remove the children temporarily from the United Kingdom to visit maternal family members in Hong Kong and Malaysia (together 'the travel applications'). The matter has been sensitively and skilfully case-managed to date by HHJ Rebecca Brown. However, the question whether travel should be permitted to Hong Kong and, in particular, Malaysia, a jurisdiction which is not party to the Hague Convention on the Civil Aspects of International Child Abduction 1980 ('the Hague Convention 1980'), is of sufficient complexity to require determination by a judge authorised to sit in the High Court. The parties and the children have been anonymised to protect their privacy and to allow publication of this judgment.

Relevant facts

2. The children are British nationals, born and habitually resident in England and Wales. The father is from South Africa. The mother is a dual British and Hong Kong national with family in both Hong Kong and Malaysia. Although the parents are unmarried, the father shares parental responsibility. The two met in 2010 when the mother was 21 and the father 36. The relationship broke down amid considerable rancour at the end of 2022. The local authority became involved following a referral by a health visitor on 16 December 2022 after an allegation of domestic abuse by the mother to which (it was alleged) the children had been exposed. On 18 December 2022 the father contacted the police to report the mother for having abandoned the children. The local authority initiated an investigation under s 47 of the 1989 Act and on 6 January 2023, on the advice of a social worker, the mother and the children moved from the home they shared with the father to the maternal aunt's home. All contact with the father ceased. The local authority conducted a child protection conference on 10 January 2023, which recorded the mother's allegations of coercive and controlling behaviour by the father. The children were made the subject of a Child Protection Plan on the same date, which also recommended that the parents engage with counselling, parenting courses and an anger management course.
3. On 1 February 2023, on the father's application, the Court made an interim prohibited steps order on the papers restraining the mother from removing the children from the jurisdiction. The matter came back for directions on 3 February 2023, by which time limited contact between the father and the children had resumed every Sunday at the church the family attended. The mother was deemed to have applied for a specific issue order permitting her to travel with the children

to Spain, Malaysia and Hong Kong. The judge gave further directions, including that Cafcass file a risk assessment under s 16A of the 1989 Act, which recommended that contact between the children and the father be supervised. On 31 March 2023, the Court ordered supervised contact between the father and the children at a contact centre every Saturday. The mother subsequently moved with the children to a house owned by her mother.

4. On 29 March 2023 the first Child Protection Review Conference concluded that both children were at risk of significant harm and should remain under a Child Protection Plan under the category of emotional abuse. On 21 April 2023 the Court ordered further direct and indirect contact between father and the children and gave the mother permission temporarily to remove the children to Spain for a two-week holiday, on the giving of a number of undertakings by the mother with the understanding that breach might result in a fine or imprisonment. The Court requested the local authority to provide a report under s 7 of the 1989 Act setting out its views as to the appropriate child arrangements for the children.
5. The mother took the children on holiday to Spain between 21 and 30 May 2023. Despite the father's concerns, the holiday passed without hitch and the mother complied with all of the undertakings and directions. On 19 July 2023, the Court ordered increased contact between the father and the children, arrangements that have continued until the current hearing. Both children stay with father from Friday afternoon to Sunday afternoon on alternate weekends. HTD also spends from Tuesday afternoon to Wednesday afternoon with her father.
6. The local authority completed its s 7 Report on 31 August 2023. Although this report is now out of date, it is of relevance that the local authority had 'no objections' in principle to father's proposal of a 50/50 shared care arrangement. However, the report expressed concern about the impact on the children of the disruption of moving between their parents' houses, particularly during school time; noted that the father's house was not suitable for him and the children in the longer term; and raised questions about the degree of support the father could rely upon. Accordingly, the recommendation was for the children to live with the mother but to have regular contact with the father, consistent with that the order of 19 July 2023. The report also recommended that the parties engage in parenting support to bring their parenting styles in line with each other and that the father attend programmes on domestic abuse to 'promote his awareness and effective communication among the family in the best interests of the children'. The s 7 Report found that both parents were 'equally complicit' in causing the children emotional harm from the conflict in their relationship. The father lacked awareness of how his own behaviours could be seen as abusive, which included making recordings of the mother without her consent and, on one occasion, threatening to slash the tyres on the mother's car. The father, rather than addressing the concerns around his conduct, was more preoccupied with countering the mother's allegations of coercive and controlling behaviour. This 'made it difficult to put in place any intervention that can address the acrimony between the parents with a view to reduce the level of risk the children are being exposed to'. The mother, for her part, was recorded shouting at the father during altercations and (he alleged) had physically assaulted him. There was also

concern that she tended to enforce restrictions around the children's contact with the father but ignored those around her own contact.

7. On 4 October 2023 the court ordered that the child arrangements made on 19 July 2023 were to continue with an additional restriction, following objections by the mother to the father's new girlfriend being involved in the children's care, that only the father or the paternal grandmother were to conduct handovers, collections and drop-offs at school and day care. The court made directions for the final resolution of the substantive applications, including the instruction of experts to give evidence as to Hong Kong and Malaysian law to inform the court when deciding the travel applications.

The hearing

8. I heard the applications over two days. The mother was represented by Ms. Daly, to whom I am grateful for her assistance. The father was unrepresented. The bundle included expert reports on Malaysian and Hong Kong law; local authority records, including the s 7 Report; the s 16A Cafcass report; four witness statements from the mother and two from the father, together with exhibits. I did not consider it necessary for the parents to give evidence on oath to be cross-examined on their witness statements. This was because the parties had agreed, and the judge had directed, that there was to be no fact-finding in relation to their respective allegations of abuse against each other. I did hear directly from the mother in response to specific questions I posed, as well as through her counsel. I heard from the father who, unsurprisingly, found it difficult to distinguish between the giving of evidence and the making of submissions. I was at pains to ensure the father understood what was happening at each stage. He nevertheless found the process highly stressful, evidenced by the fact his attitude was rather rigid and confrontational. I do not draw any adverse conclusions from that. I did hear evidence on oath from the previous social worker who was asked questions by Ms. Daly and by the father through me. However, she was not able to give up-to-date evidence as responsibility for the family has transferred to another local authority. The social worker's last involvement with the family was on 2 October 2023. Unfortunately, it was not possible to arrange for the new allocated social worker to attend at such short notice. This issue took on a particular significance on the second day of the hearing when the mother revealed, through counsel, that she has raised fresh safeguarding concerns with the new social worker. These included that the father has shown HTD videos of the parents arguing; that HTD has told her she does not want her father picking her up; and HTD has told her that her father has said he does not like her. The social worker confirmed that these were new allegations that should be investigated.

The 'gofundme' page

9. On the second day of the hearing Ms. Daly very properly disclosed to the father and to the court that the mother had recently set up a 'gofundme' website in a misguided attempt to raise funds for these legal proceedings. In that post the mother identifies herself and the children by name, including a photograph of the three of them. She publicises her accusations of coercive and controlling behaviour against the father, despite the fact that she no longer pursues those allegations in these proceedings. Although she does not name the father, anyone

who knows the family will readily identify him. She also revealed details of the applications the mother is making in the family proceedings. By the time the webpage had been deleted on 1 December there had been 37 donations totalling £3,350. I pointed out to Ms. Daly that this appeared to be a contempt of court under s 12 of the Administration of Justice Act 1960 ('the 1960 Act') and a breach of s 97(2) of the 1989 Act, which makes it an offence for any person to publish to the public at large or any section of the public any material which is intended or likely to identify any child as being involved in any proceedings before the Family Court in which any power under the 1989 Act may be exercised. It is also an apparent breach of the orders made in these proceedings to date (there have been 8) which all contain a confidentiality warning stating that 'the names of the children and the parties are not to be publicly disclosed without the court's permission'. The two most recent orders also make clear that it is an offence to make any such disclosure.

10. Ms. Daly submitted that her client had not known that such publication was prohibited. Having satisfied myself that the webpage had been deleted, for the avoidance of doubt I made a prohibited steps order restraining the mother from any similar publication. I then indicated that I would reflect on the implications of this conduct. As will be seen, I have decided it is a relevant factor in my decision-making in relation to the travel applications. As to the potential contempt issue, there are three possible ways forward. First, the Court could refer the matter to the Attorney-General to decide whether to bring contempt proceedings, although that is likely to be a protracted process and may not be proportionate. Second, the father could bring contempt proceedings under FPR r. 37(3). Permission to do so would be required under FPR r 37.3(5), applying the test recently considered by Mostyn J in *EBK v DLO* [2023] 4 W.L.R. 51, [72]. Third, the Court could proceed of its own motion by issuing a summons under FPR r. 37.6(3). In any event, the mother will need an opportunity to take advice and, if proceedings are instituted, would be entitled to legal aid: *HM Solicitor-General v. JS* [2023] EWHC 2684 (Fam), [11]. The potential breach of s 97(2) of the 1989 Act would require an independent decision to prosecute and would proceed in the magistrates' court, both of which are out of this Court's hands. I return to this issue at the conclusion of my judgment.

Determination: the child arrangements applications

11. I regret that I am not able to make a final order given the s 7 Report is out-of-date, fresh allegations have been made which have yet to be investigated, responsibility for the family has been transferred to a new local authority, the previous allocated social worker (who gave oral evidence) cannot give up-to-date evidence and the current allocated social worker was not available to give evidence. I direct that a fresh s 7 Report should be prepared which, I understand, is likely to take between 8-12 weeks. The new social worker should be available to give evidence at the final hearing. That said, I am satisfied, having regard to the welfare checklist in s 1(4) of the 1989 Act, that it is in the best interests of the children for the contact arrangements to be varied so as to give the children more contact time with their father. It became apparent during the course of the social worker's evidence that there had been a shift in the local authority's assessment of the children's risk. At the latest Child Protection Review Conference on 2

October 2023 the children were considered to be at a lower risk of harm and no longer required a 'Child Protection Plan' but only the lower level 'Child in Need Plan'. The social worker gave oral evidence that she had 'no safeguarding concerns' around the father having 50/50 shared care. She no longer had any of the practical concerns expressed in the s 7 Report which led to her recommending that the father only had contact on alternate weekends, save as to the disruption to the children caused by too frequent transfers between the parents' houses. Moreover, the mother was prepared to increase the period both children spent with the father during term-time from two nights (Friday to Sunday evening) to four nights (Friday to Tuesday morning) on alternate weekends, although she wished to end the overnight stay that HTD currently has with her father each Tuesday overnight because, she said, of the disruption this causes. The parties were also able to reach agreement on a broadly equal share of time between them over the Christmas holiday. The father welcomed the increase to four nights on alternate weekends but opposed the removal of the weekly visits he has from HTD, pointing out that he will not see either of his children for 9 days in the weeks they do not spend the weekend with him. He would prefer to have two nights every week with HTD on Monday and Tuesday. The father also complained that his girlfriend, who is a registered child minder, was not allowed to accompany him to collect or drop off the children.

12. I will order that, on alternate weeks during term-time, both children will spend from Friday after nursery or day care until drop off on Tuesday morning with their father. Every other week, HTD will stay with her father from Monday after school until Tuesday evening, with father collecting after school and returning to mother's house by 6 pm if possible. I do not consider it appropriate, at this stage, for HTD to spend two nights with her father; that would mean every other week she would have two nights with her father (Monday and Tuesday), two with her mother (Wednesday and Thursday) then four with her father, which would be disruptive to any routine. The new arrangement replicates the existing weekly contact HTD has with the father but on a Monday night, not a Tuesday night, in line with the father's preference. Both children will spend two additional nights with father on alternate weekends (Sunday and Monday in addition to Friday and Saturday). I also order that the restriction on the father being accompanied by anyone other than his mother for drop-offs and pickups be lifted. The children's holidays and half-terms should be spent equally between the mother and father in blocks of up to a week, although the parents can agree a shorter or longer period. I do not accept the mother's case that HTE, now 14 months and no longer breastfeeding, cannot spend more than 4 nights away with his father.
13. There should be a 6-month period of trialling the increased contact with the father before a final decision is taken on the care arrangements, in particular whether these should be on a 50/50 shared 'live with' basis (as sought by the father) or a 'live with' mother and 'spend (less) time with' father basis (as sought by the mother). Resolution of that issue should be informed by an up-to-date s 7 Report from the new local authority and can be dealt with by HHJ Brown or another judge of the same level. In deciding that issue the Court is likely to be assisted by the considerations in *F v L (Child Arrangements Order - Relocation)* [2018] 4 W.L.R. 141, [70-74].

Determination: the travel applications

14. The mother originally applied for permission to travel to Spain, Hong Kong and Malaysia. The trip to Spain was to attend her sister's wedding in May 2023. HHJ Brown authorised this and it passed off without difficulty. The proposed trips to Hong Kong and Malaysia were to visit family and for HTD to attend a bilingual summer school in August and to attend the maternal uncle's wedding celebrations in October and November. The father's objection to these trips meant that the Court had to resolve the dispute. The hearing could only be listed after these events had passed. The mother now seeks the Court's authorisation for a trip to Hong King and Malaysia for a two-week trip over Easter 2024 to visit family in both jurisdictions.
15. The concern that underpins the father's objection and his application for a prohibited steps order, and which must inform the court's consideration of the mother's application for leave to remove, is that the mother may abduct the children once they are beyond the reach of the Courts of England and Wales. That concern is particularly acute in relation to Malaysia or Hong Kong given the mother's family ties to those jurisdictions.

The legal framework

16. The starting point is s 13 of the 1989 Act. Section 13(1) (when read with s 13(4)) provides that 'where a child arrangements order [which regulates when and with whom the child concerned is to live] is in force in respect of a child ... no person may ... (b) remove him from the United Kingdom ... without either the written consent of every person with parental responsibility for the child or leave of the court'. Section 13(2) provides that s 13(1)(b) 'does not prevent the removal of a child, for a period of less than one month, by a person named in the child arrangements order as a person with whom the child is to live'.
17. An interim child arrangements order is in place. The father shares parental responsibility for the children and objects to the children's removal to any jurisdiction outside the United Kingdom, but particularly to Malaysia and Hong Kong. The exception in s 13(2) does not apply as there is currently no child arrangements order in place that names any person, whether mother or father, as 'a person with whom the child is to live'. In any event, I have no doubt that where one person with parental responsibility raises a concern that another person who is named in a child arrangements order as 'a person with whom the child is to live' may abduct a child, the Court must consider that question and may override the exception in s 13(2). It is therefore for this Court to decide whether to give the mother leave to remove the children to Hong Kong and/ or Malaysia even on a temporary basis of less than one month.
18. The relevant principles to be applied by the Court in resolving any dispute as to whether such travel should be permitted were identified by the Court of Appeal in *Re. A (Prohibited Steps Order)* [2014] 1 FLR 643, [23] and [25] and as applied in numerous cases since, notably by the Court of Appeal in *Re. H (A Child)* [2014] EWCA Civ 989 and *M (Children) (Non-Hague Convention 1980 State)* [2020] EWCA Civ 277 and by Baker (then) J in *Re. DO and BO (Children) (Temporary Relocation to China)* [2017] EWHC 858 (Fam) and *M v F (Removal from*

Jurisdiction: Practice [2017] 4 WLR 149. In summary: (1) ‘The overarching consideration for the Court in deciding whether to allow a parent to take a child to a non-Hague Convention 1980 country is whether the making of that order would be in the best interests of the child’: *Re. A*, [23]. (2) ‘The court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entail’: *Re. A*, [23]. (3) ‘If in doubt the court should err on the side of caution and refuse to make the order’: *Re. A*, [23]. (4) Resolution of this issue involves consideration of three related elements (*Re. A*, [25]; *Re. H*, [15]): (a) ‘the magnitude of the risk of a breach of the order if permission is given’ (in other words, the degree of risk of abduction); (b) ‘the magnitude of the consequences of the breach’ (the degree of harm to the children and the father as a result of their abduction); (c) ‘the level of security that may be achieved by building in to the arrangements all of the available safeguards’ (namely, those safeguards that reduce the risk of abduction and those that increase the likelihood of securing the children’s return in the event of abduction). (5) The Court must give ‘rigorous scrutiny’ to these three elements: *Re. H*, [14]. (6) In assessing the risk of abduction, ‘it is customary, if there is to be an evaluation of the applicant’s trust, for oral evidence to be led so that the judge has an opportunity of assessing credibility and reliability from exposure in the witness box’: *Re. M*, [54]. (7) The relevant safeguards ‘should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the United Kingdom-based parent’: *Re. A*, [23]. (8) ‘In most cases there is a need for the effectiveness of the safeguards to be established by competent and complete expert evidence which deals specifically and in detail with that issue’: *Re. A*, [23]. (9) ‘Although such cases involve fact-finding, they are often more about issues of comity, the effectiveness of diplomatic or consular assistance in the foreign jurisdiction and the relevance of the facts alleged to the risk, including issues of political and religious conflict’: *Re. H*, [14].

19. These principles apply to removals to jurisdictions that are not signatories to the Hague Convention 1980: *Re. A*, [23]. However, the key principles, if not all of them, undoubtedly also apply where the proposed destination is a Hague Convention 1980 jurisdiction. In a Hague Convention 1980 case, there are clear legal safeguards in place that allow for the child’s return in the event of abduction. The Court is therefore more likely to permit the child to travel to such a jurisdiction. However, the Court must still resolve any dispute under s 13(1)(b) and, in doing so, must still be positively satisfied that the travel proposal is in the children’s best interests by reference to the three elements identified in *Re. A*, [25], to which I now turn.

First element: the degree of risk of abduction

20. At the heart of the father’s concern about the mother’s ‘flight risk’ is a comment she made in December 2022 that she and the children ‘did not need’ the father and that they would leave to live in Malaysia, where her mother lives. The mother accepts that she did say this, but only as she had been ‘provoked’. She denies she has any intention of leaving the United Kingdom permanently. She points out that, although she was born in Hong Kong (where her father still lives), her mother lives in Malaysia and she made frequent trips back to those countries pre-

Covid, she has not lived outside the United Kingdom since 2000. She attended school and college in the United Kingdom and is now employed by a United Kingdom company in a senior role to which she has recently returned following her maternity leave. She has a sister who also lives in the United Kingdom and a brother who lives in New York. Although it is important to her that the children are able to visit Malaysia and Hong Kong so as to develop a strong connection with their relatives and their culture, she does not want to live in either country.

21. Notwithstanding the mother's denials, I am satisfied that the father has a legitimate concern that, if permitted to travel to Malaysia or Hong Kong, the mother may decide not to return with the children. Even if that is not her current intention, once she is with her family, particularly with her mother, there is a risk that she may decide she would prefer to leave the animosity and stress of her failed relationship behind and to make a new start in either Malaysia or Hong Kong. I did not need to hear her give live evidence to reach that conclusion as I accept that, at present, she genuinely intends to return to the United Kingdom.
22. The risk is heightened by the fact that the mother has published details of the children and the allegations made about the father online on a 'gofundme' webpage in breach of court orders. Even if she did not do so deliberately, the publication of those details without first checking with her legal advisers was a serious error of judgment. Either way, this makes it difficult for the Court to trust that the mother will not breach a court order deliberately or as a result of another serious error of judgment if she is permitted to travel with the children. I therefore conclude there is a 'moderate' risk – a not insignificant risk - that the mother will abduct the children if she is permitted to remove them temporarily to Malaysia or Hong Kong. That risk would be lower if she is permitted to travel with them to a Hague Convention 1980 jurisdiction closer to the United Kingdom, such as Europe, where she does not have the same family and community ties or the same resources available to her.
23. At one point the father had raised the prospect of the mother travelling from Hong Kong to mainland China and retaining the children there. Although he appeared to withdraw that suggestion during the hearing, I do accept that it is a risk. However, the mother does not have family ties in mainland China and the advantages of moving to China in preference to the United Kingdom are less obvious. The expert evidence also makes clear that neither the mother nor the children could travel to mainland China without additional travel documents, although I have no evidence as to how difficult or easy it would be to obtain such documents. Nevertheless, I consider the risk of such a move to be 'low'.

Second element: the degree of harm to the children and the father as a result of their abduction

24. If the mother did not return the children to the United Kingdom it could cause them significant harm. It would deprive HTD, in particular, of her friends, home environment, nursery and the culture in which she has been raised. Most damaging, it would deprive the children of their relationship with their father, which is of fundamental importance to them both. Although any harm might be mitigated if the father were able to secure their return through the Courts of Malaysia or Hong Kong, the longer the process went on the more likely it would

cause them harm and the more significant that harm. The conflict between the parents that has led to the involvement of social services and the children being placed on the 'at risk' register would be worsened, causing further emotional harm to the children. I hardly need add that the consequences would be devastating for the father, whose love for his children is quite evident. The monetary cost to the father of pursuing any legal remedies would be significant and could easily exceed the £10,000 security proposed by the mother by way of a safeguard (see below).

Third element: the available safeguards

25. The mother put forward a number of safeguards that, she argued, would reduce the likelihood of her retaining the children in Hong Kong or Malaysia. She offered to give undertakings or submit to orders that she: (1) will return the children, on the understanding that breach of such an undertaking or order could lead to her immediate imprisonment; (2) will pay security of £10,000 to a firm of solicitors that would be forfeit in the event she did not return and would be available to the father to defray the costs of any legal proceedings to secure the children's return; (3) will only travel on her British passport, leaving her Hong Kong passport and identity card with solicitors in the United Kingdom, and will not apply for any other travel documents for her or the children while abroad; (4) will lodge her and the children's British passports with the British Embassy or a firm of solicitors in the relevant jurisdiction for the duration of their stay; (5) will not travel to any other countries during any visit; (6) will provide full details of travel to the father 4 weeks in advance of the trip and daily updates (texts and images) in respect of the wellbeing and location of the children during the trip; and (7) will ensure indirect contact with the father twice a week.
26. The father points out that these will have little effect if the mother is committed to leaving without ever returning to the United Kingdom. However, I accept that undertakings or orders to that effect would provide the mother with a strong disincentive to retain the children in either jurisdiction. The risk in her case is not that she is deliberately planning to abduct the children; rather that, once there, she will be strongly tempted to remain. The mother's deliberate or careless breach of confidentiality orders by publishing the 'gofundme' page heightens that risk. The safeguards proposed by the mother will go some way to reducing the risk.
27. There are also safeguards available to the father to secure the children's return in the event that the mother was to retain the children in that jurisdiction.
28. Hong Kong, like the United Kingdom, is a signatory to the Hague Convention 1980. Expert evidence was provided to the Court on the law in Hong Kong by Mr. Chuan Tao Wong, a Consultant Solicitor in a Hong Kong Law firm who has been qualified since 2012. He explained that the Hague Convention 1980 is given effect in Hong Kong by the Child Abduction and Custody Ordinance (Cap. 512 of the laws of Hong Kong), introduced on 5 September 1997 ('the CACO'). By s 3 of that Act, the provisions of the Hague Convention 1980 'shall have force of law in Hong Kong'. In the event that the mother was to retain the children in Hong Kong, the father would be entitled to make an *ex parte* application for a recovery order under s 16 and 17 of the CACO. Given the United Kingdom is also a signatory, he would first contact the Central Authority for England and

Wales who would pass on the request to the Secretary of State for Justice in Hong Kong to initiate an application under the CACO. The father might be entitled to legal aid in pursuing an application under the CACO provided his financial resources do not exceed HK\$433,010 (about £43,600).

29. The purpose of the Hague Convention 1980 is to provide a swift, summary procedure for a left-behind parent to secure the return of a child wrongfully removed to or retained in another country by the removing parent. Where the procedure is triggered the courts of the requested state are required to ‘act expeditiously’ (Article 11), if possible within six weeks of the request being made. By Article 12 the Courts of the receiving state are under a duty ‘forthwith’ to return a child who was under 16 and ‘habitually resident’ in the requesting state at the date of their wrongful removal or retention.
30. There are certain exceptions to the duty of return under the Hague Convention 1980, most relevantly if ‘there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation’: Article 13(b). There is a risk that if the mother did unlawfully retain the children in Hong Kong that she would raise a defence under Article 13(b) on the grounds of the safeguarding concerns or the allegations of domestic abuse raised within these proceedings. If she did so it would delay, if not prevent, the children’s return. During the hearing, the mother agreed to give an undertaking that she would not raise such a defence in the event that such proceedings were brought.
31. Mr. Wong also gave evidence as to whether an order of this court would be recognised and enforceable in Hong Kong. He explained that Hong Kong is not a signatory to any of the international conventions on the recognition and enforcement of foreign judgments (the Hague Conventions 1971 and 2019). Furthermore, there is no statutory regime for the making of a ‘mirror order’ in Hong Kong that would render an order of this jurisdiction directly enforceable. Under Hong Kong common law a ‘mirror order’ may be made that gives effect to certain foreign judgments, but at present these are limited to orders for a debt or a defined sum of money. In the case of *Jian Xi An Fa Da Wine Co. Ltd. v Zhan King* [2019] HKCFI, Wong J held at [84] that this limitation on the enforcement of foreign judgments should no longer apply, but her ruling was *obiter dicta* and the point has yet to be tested, in particular in the context of an order in proceedings in wardship or under the Children Act 1989. This is therefore a potential safeguard, but would require further steps to be taken before the Court could be satisfied it was available.
32. Malaysia is a non-Hague Convention 1980 jurisdiction. However, I received an expert report from Mr. The Han Ker, a Malaysian barrister with 17 years’ experience, to the effect that very similar safeguards to those under the Hague Convention 1980 would be available in the event the mother retained the children unlawfully. The Malaysian Courts have jurisdiction under s 101 of the Law Reform (Marriage and Divorce) Act 1976 (‘LRA 1976’) either to restrain a person from removing a child from Malaysia or to order the return of a child from Malaysia to another jurisdiction. An application for an injunction under s 101 may be made on the application of either the mother or the father. In the leading case of *Balasubramaniam v Kohila* [1997] 4 CLJ 676, the Malaysian Court of

Appeal made an order under s 101 of the LRA 1976 for the immediate return to Canada of a child wrongly retained in Malaysia. In doing so, they applied English case-law (*Re. T (Infants)* [1968] 1 Ch 704, *Re. L (Minors)* [1974] 1 WLR 250 and *G v G (Minors) (Abduction)* [1991] 2 FLR 506) as authority for the proposition that ‘if the child’s settled home was in [another] country, a peremptory order for return of the child will be ordered unless there is some *prima facie* evidence that the child would be harmed or that the host country would not apply the paramountcy of the child’s welfare principle’. The Court of Appeal went on to conclude that, ‘in the absence of any credible evidence that the children will come to any real harm if they are sent back to Canada, their father should be allowed to take them there as soon as possible. It would be very undesirable to permit the children to remain in Malaysia to develop roots here’.

33. On the question of whether judgments of the English Courts would be recognised and enforceable in Malaysia, the report explained that a ‘mirror order’ would not be available. The Reciprocal Enforcement of Judgments Act 1958, which provides for reciprocal enforcement of judgments between the United Kingdom and Malaysia, does not apply to matrimonial proceedings. Malaysia is not a party to any of the Hague Conventions. However, the Malaysian Courts do recognise and give effect to foreign judgments under the principle of judicial comity and the report states that ‘it could not be clearer that Malaysian courts will give special consideration and effect to foreign judgments binding [the mother] in considering [the father’s] application under the LRA 1976’.
34. The report went on to conclude that the expert had ‘an enormous amount of confidence’ that if the mother in this case were to retain the children in Malaysia the father would be able to secure their return ‘in the absence of proof of harm to them upon return’. I note that the mother was willing to give an undertaking that she would not raise a defence in a court in Malaysia that the children would be at risk of significant harm based on the safeguarding concerns or allegations of domestic abuse that have been raised in these proceedings.
35. Although legal aid would not be available to bring proceedings for an injunction under s 101 LRA 1976, the expert gave an estimate of the costs of bringing such proceedings of between 20 to 40 thousand Malaysian Ringgit (MYR) (approximately £3,325 to £6,750).
36. According to the expert there is an additional legal safeguard in Malaysia, namely s 49 of the Child Act 2001. This provision makes it an offence to bring a child into Malaysia ‘under any false pretence or representation made’. I do not consider this adds much, not least the difficulty of proving that the mother had brought the children into Malaysia with the intention of abducting them. I have already concluded the more likely risk is that the mother would decide to remain in Malaysia once she got there, not that she is intentionally planning to abduct the children.

The welfare analysis

37. I must now apply these factors in the context of the welfare analysis required by s 1(3) and s 1(4) applying the principle that the children’s welfare is the Court’s paramount consideration. It is clearly in the best interests of the children to meet

all members of their family and to learn about their background, language, heritage and culture. The older the children get, the more important that will be. But that does not mean they must travel to Hong Kong and Malaysia for those purposes when they are, respectively, 1 and 4 years' old. They are already able to see their maternal grandmother, who regularly visits the United Kingdom, and their maternal aunt who lives here. In any event, there is a more fundamental need in this case, namely for the parents to develop a degree of trust and co-operation that will enable them to provide the children with the emotional stability they currently lack. Until very recently the children were on the 'at risk' register because of the emotional harm they have suffered due to their parents' toxic relationship. They remain sufficiently at risk of such harm for the local authority to rate them both as a 'Child in Need'. The local authority has worked, and continues to work, with the parents to help them develop the skills and to rebuild the necessary trust and co-operation to parent their children effectively. The disclosure that the mother has publicised details of these proceedings online has inevitably set back this process. For the mother to travel with the children to Hong Kong or Malaysia at this stage will further undermine that process and will lead to additional conflict. Furthermore, there is a moderate risk that the mother would not return the children if she is permitted to travel. I accept that the safeguards proposed by the mother would reduce that risk to some extent. I also accept that the legal safeguards in both jurisdictions mean it is likely that the courts would order the children's return. However, that process will be traumatic, costly and potentially protracted if the mother revives the allegations of domestic abuse, which is a realistic possibility despite the mother's proposed undertaking not to do so. The minimal benefit to the children from travelling at this time is outweighed by the risk of further emotional harm from the parental conflict that travel would or might cause. I am therefore not positively satisfied that it is in the children's best interests to travel at this time.

38. The parents need to work with the local authority on developing their parenting skills and rebuilding trust and co-operation for a sustained period. Only then will the risk of the children suffering continuing emotional harm reduce. I therefore make an order that the mother should be prohibited from removing the children to Hong Kong or Malaysia for a period of 12 months. By then the calculus may have changed and it may be in the children's best interests to travel to either or both jurisdictions, although the mother will need to make a further application for leave to travel to either jurisdiction after the expiry of the prohibited steps order if the father still objects. If the mother wishes to remove the children to another jurisdiction in the meantime and the father objects that will need to be the subject of a further application to the Family Court for leave under s 13(1)(b). I would foresee no difficulty if either parent wished to take the children for a short break within the European Union, where the safeguards to ensure a speedy return are still the strongest, and upon suitable undertakings. Either HHJ Brown or another judge of the same level could decide such an application, but I hope the parents could agree such an arrangement. If either parent wishes to travel to another jurisdiction outside the EU and the other does not consent then that application would need to be decided on its merits with expert evidence.

Conclusion

39. The father's application for a child arrangements order is adjourned for 6 months to allow an up-to-date s 7 Report to be prepared and the new contact arrangements outlined at paragraph 12 above to be tested.
40. On the travel applications, I dismiss the mother's application for a specific issue order permitting her to travel to Malaysia and Hong Kong and allow the father's application for a prohibited steps order to the extent the mother is prohibited from removing the children to Malaysia and Hong Kong for the next 12 months.

Postscript

41. I circulated a draft of this judgment in advance of hand-down on 8 December 2023 when I considered written and oral representations from the mother and oral representations from the father on the orders to be made and any consequential directions. The mother objected to the 12-month period of the prohibited steps order but I am satisfied that is the minimum period necessary for the reasons I have given at paragraph 38, above. I have also considered whether the mother should be able to apply to vary or discharge that order in the interim. In my judgment, unless there is a significant change of circumstances, such an application would simply renew the conflict between the parents and set back the process of improving trust and co-operation that is so essential for the children's emotional wellbeing. The mother nevertheless contended that this is not a case where an order preventing the mother from bringing a fresh application without the leave of the court under s 91(14) of the 1989 Act should be made. My attention was drawn to the guidance in *P. (A Minor) (Residence Order - Child's Welfare) (C.A.)*, *Re* [2000] Fam. 15 and *A (A Child) (Supervised contact) (Section 91(14) Children Act 1989 orders)*, *Re* [2022] 4 W.L.R. 25. In the first case, the Court of Appeal held that the power should be used 'with great care and sparingly, the exception and not the rule' and 'is generally to be seen as a useful weapon of last resort in cases of repeated and unreasonable applications'. In the more recent case of *Re. A* the Court of Appeal held that courts 'may feel significantly less reluctance than has been the case hitherto' to make an order under s 91(14) to protect one party from what is, in effect, a form of coercive control by the other through the prolific use of social media and emails ('lawfare'): [41-42]. The mother contended that her conduct falls far short of either 'repeated and unreasonable applications' or 'lawfare'. She submitted that a s 91(14) order should not be imposed simply to allow 'breathing space' and 'the purpose of the order could and should be achieved by giving the order time to work itself out': *G (Residence Restriction on Further Applications)*, *Re* [2009] 1 FLR 894.
42. I accept that the mother has not made repeated, unreasonable applications. I am, however, extremely concerned about the mother's willingness to publicise details of this case on a 'gofundme' page, in which she has made allegations of coercive control that she has not pursued to a fact-finding hearing. It matters not whether that can be termed 'lawfare'. It was irresponsible, unreasonable and unlawful. That, as I have found, has further undermined the local authority's efforts to assist and encourage the parents to co-operate in parenting the children. Any further applications to remove the children to Malaysia or Hong Kong during the next 12 months will rekindle the conflict during a period I consider is essential to enable

the children to have some stability. I am satisfied this is a case where it is appropriate for me to make an order under s 91(14), and I do so for a period of 12 months. That still allows the mother to seek the Court's leave to bring a fresh application if, for example, there is a material change of circumstances in the interim.

43. I also invited the parties to address me on the question of how I should proceed in the light of the mother's apparent contempt by the publication of the 'gofundme' page: see above, paragraphs 9-10. The mother indicated that she was sorry but repeated that she did not know that her conduct was prohibited. The father did not want to pursue an application for contempt, which was a sensible and reasonable approach which I applaud. I therefore have to determine whether this is an appropriate case to refer to the Attorney-General or for the Court to initiate proceedings of its own motion by summons under FPR 37.6.
44. Of the three mechanisms by which contempt proceedings may be brought, the hierarchy is (a) the person in whose favour an order was made; (b) the Attorney-General; (c) the Court, but only 'in exceptional cases of clear contempts . . . in which it is urgent and imperative to act immediately': *Bedfordshire Police v U* [2014] Fam. 69, Holman J, recently considered in *Isbilen v Turk* [2021] EWHC 854 (Ch) in the context of proceedings under CPR 81, which mirror those under FPR 37. The Court should therefore be slow to initiate proceedings of its own motion under FPR 37.6. However, I am satisfied that I should deal with the matter summarily, for two reasons. First, if I do not deal with the matter there is a risk that the issue takes on a life of its own and creates an additional cause of conflict between the parents and will further harm the children. Second, in my judgment permission would not be granted under FPR 37.3(5) if an application was made, and I see no reason why the same approach should not be applied by the Court in deciding whether to initiate proceedings of its own motion by way a summons under FPR 37.6(3). The relevant factors were considered in *EBK v DLO* [2023] 4 W.L.R. 51, [72], namely: the strength of the case; the public interest in maintaining confidentiality; the proportionality of proceedings; and the overriding objective. I would add that the best interests of the children should also be a relevant factor.
45. Applying those criteria, there is a strong prima facie case that the mother breached the confidentiality orders and has committed a statutory contempt contrary to s 12 AJA. There is also a strong prima facie case of an offence contrary to s 97(2). The public interest in the confidentiality of proceedings concerning the welfare of children is high. It is wholly inappropriate for a parent to publicise details of such proceedings and allegations concerning her partner online in the way that the mother did. The overriding consideration, however, is that committal proceedings would not be proportionate or consistent with the overriding objective. The mother has now apologised and taken down the offending web-page. The father does not want to bring contempt proceedings. I have already taken the mother's conduct into account in refusing the mother's substantive applications and in applying s 91(14). No further sanction would be appropriate even if the contempt was proved. Last, it is not in the best interests of the children for this additional source of conflict to continue. Although it is not a question for

me, for the same reasons a prosecution under s 97(2) would not be in the public interest.

46. That is my judgment.