

FINAL JUDGEMENT

Neutral Citation Number: [2018] EWHC 586 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2018

Before :

THE HONOURABLE MRS JUSTICE KNOWLES

Between :

A LONDON BOROUGH

Applicant

- and -

X

Respondents

and

Y

and

Z

(A minor)

And

ABC Minors

(through their Children's Guardian)

Mr Clive Newton QC and Miss Joanne Ecob for the Applicant
Miss Anna McKenna QC and Mr Christopher Poole for the Mother
Mr Hugh Southey QC and Miss Markanza Cudby for Z & A
Mr Sam Momtaz QC and Miss Kate Tompkins for B & C (by their Children's Guardian)
Mr Guglielmo Verdirame and Mr John Bethell for the Secretary of State for Foreign
and Commonwealth Affairs

Hearing dates: 12-16 February and 26 February 2018

Mrs Justice Knowles:

1. These public law proceedings concern four children: D, a boy born on 2 September 2000 and thus 17 years old; S, a boy born on 25 August 2005 and thus 12 years old; E, a girl born on 16 March 2007 and thus almost 11 years old; and SL, a girl born on 27 October 2010 and thus 7 years old. All the children are nationals of X and came to the UK on 11 June 2013 with their mother. The children's mother is also a national of X and works as a secretary for the X High Commission. She is also, I understand, a serving member of the armed forces of X. The mother and the four children with whom I am concerned entered the UK with diplomatic rights and privileges arising from the mother's employment at the X High Commission. The mother also has an older daughter, C, born on 7 March 1995 and thus 23 years old, who lives with her.
2. The father of D is EB who lives in X and is unrepresented in these proceedings. He had some minimal contact with the local authority in the early stages of the proceedings but none recently. The father of S, E and SL is SM who also lives in X and is unrepresented in these proceedings. It has not been possible to ascertain his views about the children as attempts to contact him have met with no success. I understand that SM is in the armed services of X and that his marriage to the mother has come to an end.
3. The local authority was represented by Clive Newton QC and Joanne Ecob. The mother was represented by Anna McKenna QC and Christopher Poole. D and S were represented separately from the Children's Guardian by Hugh Southey QC and Markanza Cudby. E and SL were represented through their

Children's Guardian by Sam Momtaz QC and Kate Tompkins. I also had the benefit of written and oral submissions from Guglielmo Verdirame and John Bethell on behalf of the Secretary of State for the Foreign and Commonwealth Affairs.

4. I held a hearing in two parts. The first part of the hearing from 12 February to 16 February 2018 inclusive concerned itself with welfare issues. The second part of the hearing on 26 February 2018 concerned itself with legal argument about the status of the children and their mother in this jurisdiction and whether I had the jurisdiction to make final public law orders with respect to any of the three younger children.
5. I read four lever arch bundles of documents and also considered a full Lever Arch bundle of law and authorities. I heard evidence from the local authority's social worker; a worker from the Keeping Families Together project; a family finding social worker; Dr Van Rooyen, a clinical psychologist appointed as an expert in these proceedings; the mother and the Children's Guardian.
6. I am extremely grateful to all the counsel who appeared before me for the quality of their written and oral submissions. They have been of enormous assistance to me.

SUMMARY OF KEY ISSUES

7. The key issues fell into two categories: the first concerned the court's jurisdiction to make final care orders in respect of children if those children continued to have diplomatic immunity by reason of their mother's employment in the X High Commission; the second comprised classic welfare

issues in public law children proceedings where the threshold criteria have been satisfied, namely (a) whether the children could be safely returned to the care of their mother; (b) if not, what their alternative placements should be; and (c) what if any public law orders should buttress the court's decision on welfare.

8. All the parties were in agreement that the court had no jurisdiction to make public law orders with respect to D as he was now over the age of 17. D had returned to the care of his mother on 3 July 2017 and was no longer the subject of any interim public law order.
9. This judgment therefore falls into two parts, the first of which analyses the jurisdictional and status arguments with respect to the children; and the second, the welfare issues. It is, however, necessary for an understanding of the legal issues in this case to set out the background to the proceedings and the recent developments since I last dealt with this matter in October 2017.

BACKGROUND

10. The mother and her five children came to the UK on 11 June 2013 so that she and her then husband, SB, could work at the X High Commission. The mother and her children thus had diplomatic status arising from her employment as a member of the administrative and technical staff at the High Commission. Problems relating to the children emerged relatively soon after the family's arrival in the UK. During 2015 there was a report from D's school that D and his siblings did not have lunch money. In May 2015 a referral was made to Children's Services following D being stabbed. D changed his account of what had happened to him several times and stated that five white males had

attacked him. No further action was taken with respect to this incident. In July 2016 a further referral was made after D went missing just before the family were due to travel to X on holiday for a month. On 14 July 2016 D was at risk of being excluded from school for an assault on another student. He was withdrawn from school by his stepfather, SB, and was taken to X by his mother and stepfather. D returned with his mother to the UK to start a new school in September 2016 but his stepfather remained in X.

11. On 25 November 2016, D divulged to the school a history of ongoing physical abuse from his mother which involved her using implements to beat him. During the subsequent police and local authority investigation, D disclosed that his mother had thrown a shoe at him causing injury to his head and had hit him with a metal stick causing an injury to his finger. He also reported incidents of his mother shouting at him, threatening him, withholding lunch money, withholding dinner, and shaving his head as a form of punishment. D said he was fearful of being taken to X by his mother, a threat which she often made to him when she felt he was not listening to her.
12. D also reported that the mother used physical punishment on all the younger children. He said that they were all hit with a belt up to 40 times or until the mother became tired. S and SL then confirmed that their mother had hit them with a belt. S corroborated D's account that his hair had been shaved as a punishment and that he had been sent to X for bad behaviour. D was also seen with a mark on his left cheek. He explained that this had happened when his elder sister, C, had put a hot iron on his cheek. D had told his mother who denied that this had happened.

13. All of the children were made subject to police protection and were placed in foster placements. D and S were placed separately from E and SL. Following the expiry of police protection on 28 November 2016, the mother signed a s.20 agreement for the children to remain in foster care although she denied the allegations of physical abuse. On 29 November 2016 a child protection medical was undertaken of D which revealed that he had multiple marks all over his body consistent with non-accidental injuries. E and SL were ABE interviewed and both confirmed being hit with a belt by their mother and having seen their siblings being hit. D's ABE interview was cancelled on 30 November 2016 due to concerns that his family had diplomatic immunity.
14. On 1 December 2016 the mother accepted at a meeting that her parenting of the children had been inappropriate at times although she said that she was not aware that her parenting was inappropriate in the UK. She accepted that she sometimes smacked the children as a form of discipline but said that the children had exaggerated some of what had occurred in the family home. She said that D was lying because he wanted his freedom. The local authority was concerned that the mother minimised the difficulties and was only willing to work with the local authority because she was frightened of being sent back to X. Nevertheless, she agreed to work with the local authority, saying that she and her children would be sent back to X by the High Commission if she did not cooperate. The local authority issued care proceedings on 9 January 2017.
15. On 7 February 2017 Ms Justice Russell allocated the case to the High Court on the basis of (a) the continuing element of international law arising from the mother's diplomatic status consequent upon her employment as a member of

the administrative and technical staff of X High Commission; and (b) concerns that D and the mother might feel under pressure to engage with the local authority and with the care proceedings due to their concerns that they may be sent back to X. The order dated 7 February 2017 recorded that the courts of England and Wales had jurisdiction to hear the care proceedings and that the mother and children did not have immunity from those proceedings by virtue of the mother's employment with X High Commission. There remained a live issue as to whether public law orders could be enforced against the mother and the children by reason of their diplomatic privileges and immunities.

16. During the early part of 2017, D's behaviour deteriorated. He went missing from his foster home and was guarded as to his whereabouts when questioned. When placed in semi-independent accommodation, he became involved in criminal activity whilst missing from that placement: for example, on 4/5 March 2017 he was arrested for possession of knives; on 15 March 2017 he was arrested for robbery; and on 13 April 2017 he was arrested on suspicion of shoplifting. It was suspected that D was affiliated to a gang and was also associated with substance misuse. The local authority decided to support D's return home to his mother at a hearing on 3 July 2017 as the risks of such a return appeared to be lower than those presented by D's non-engagement and absconding from local authority care. D returned home to his mother shortly after the hearing and has remained living at home since that time.
17. The timetable for the proceedings was repeatedly extended. The mother withdrew her s.20 consent for the children to remain in foster care on 20 July 2017 and on 26 July 2017 Mr Justice Cobb made interim care orders on a

holding basis until 11 August 2017. On 11 August 2017 interim care orders were made in respect of all the children (except D) with no opposition from the mother. On 23 August 2017 Mr Justice Hayden approved the position taken by all the parties that a fact-finding hearing was not necessary in the light of the threshold concessions made by the mother, these being of sufficient severity for the assessments of her to be predicated upon a realistic evaluation of any future risk she posed to the children. The matter was listed for a final hearing with a time estimate of five days commencing on 23 October 2017.

18. On 11 October 2017 the mother was informed by the X High Commission of her recall to X by the President of X although it was unclear when this would take effect. Just before the mother's recall became known, the local authority was at the point of filing and serving its final evidence and care plans. At that stage, the local authority sought final care orders for the younger children based on a plan for long-term foster care with a view to the children's potential rehabilitation to the mother in the longer term if she were to successfully complete the therapeutic work recommended by Dr Van Rooyen, the clinical psychologist jointly instructed as an expert in these proceedings. Those plans had been formulated on the basis that the mother would remain in the UK and would have regular contact with the children.
19. In the light of the mother's recall to X however, the local authority swiftly reconsidered its position and took the view, on balance, that the evidence in this case as to the risks to the children which would arise from being returned to their mother and being taken to X by her, were not such as would justify a

plan for them to remain in the UK in long-term foster care. The local authority did not consider that such a care plan for these children away from all familial, national and cultural ties, would be either necessary or proportionate. The local authority indicated it would be seeking a planned rehabilitation to the mother if the timing of the mother's recall permitted this. Dr Van Rooyen's advice was then sought as to how the transition to the mother's care could best be managed in the circumstances.

20. At a hearing before me on 19 October 2017, representatives of X High Commission attended and indicated that the mother should return to X with all the children. No timeframe was indicated as to when the mother's recall to X was to be effected. The Secretary of State for the Home Department who was represented at that hearing informed the court that no formal notification of the mother's recall had been thus far received by the Foreign and Commonwealth Office ["the FCO"].
21. I conducted a hearing between 23- 27 October 2017 and gave a judgment which is in the bundle. On the basis of a consensus amongst the parties which had emerged following the oral evidence of Dr Van Rooyen, I adjourned the proceedings until 12 February 2018 for the mother to undertake the work recommended by Dr Van Rooyen and for Dr Van Rooyen to further report as to her progress. The work comprised (a) individual counselling sessions to develop the mother's insight into her past behaviour and her empathy as to the children's situation; (b) parenting work which would start after the mother had had three sessions of individual counselling; and (c) family therapy. The mother was also offered some anger management work. All the parties were in

agreement that this work should take place though the Children's Guardian was more cautious about a successful outcome. I made it plain in my judgment that my approach was governed by the paramountcy of the children's welfare. The imminence or not of their mother's recall to X was an important factor but was not determinative of the outcome of the proceedings. The options for the children remained open since what was required of the mother in a relatively short space of time was, to use Dr Van Rooyen's words, a big ask. Whilst Dr Van Rooyen acknowledged the desirability of rehabilitation of the children to the mother's care and that in the circumstances no time should be lost in putting this plan into practice, she also maintained her position that the prognosis for the mother to make the necessary changes in her parenting was guarded.

22. An interim hearing took place on 14 December 2017 to consider the plan and to ensure that the proceedings were on track for final determination in February 2018. By that stage, it was clear that the mother had not had sufficient counselling sessions to allow the parenting work to begin. In addition, on 13 December 2017, the local authority had received an email from the X High Commission which stated that it had informed the FCO of the mother's recall and which confirmed that the mother's salary would no longer be paid after the end of December 2017. Clarification was sought from the FCO and it certified after the hearing that no notification of the recall had been provided to it by the X High Commission. On 18 January 2018 the X High Commission sent a letter to the local authority stating that the only outcome to the proceedings that it would countenance was the return of the children to their mother's care.

23. On 8 February 2018 a certificate pursuant to s.4 of the Diplomatic Privileges Act 1964 [“the 1964 Act”] was received from the FCO which stated that the mother’s functions with the X High Commission ended on 31 December 2017 and that, as a result, her diplomatic privileges and immunities ended on 31 January 2018 along with the diplomatic privileges and immunities of any person recognised as being a member of her family and who formed part of her household. The certificate read as follows:

“Under the authority of Her Majesty’s Principal Secretary of State for Foreign and Commonwealth Affairs conferred on me and in accordance with the provisions of Section 4 of the Diplomatic Privileges Act 1964, I, [name withheld], Director of Protocol at the Foreign and Commonwealth Office (“the FCO”) hereby certify the following facts:

1. On 22 July 2013 the High Commission for [...] X (“the High Commission”) notified the FCO that the diplomatic appointment of [the mother] as a member of the administrative and technical staff at the High Commission had commenced on 15 July 2013.

2. Following recent correspondence with the Charge d’Affaires at the High Commission in order to clarify the date of [the mother’s] final departure or the termination date of her functions with the mission, the FCO considers that [the mother’s] functions with the mission ended on 31 December 2017.

3. Pursuant to Article 39(2) of the Vienna Convention on Diplomatic Relations 1961, the FCO normally considers that individuals who enjoy diplomatic privileges and immunities shall continue to do so for 31 days after the day on which their functions, or those of the person from whom they derive their

privileges and immunities, come to an end. Thereafter, they are treated as having leave to remain in the United Kingdom for a further 90 days, in accordance with Section 8A of the Immigration Act 1971.

4. As a result [the mother's] diplomatic privileges and immunities ended on 31 January 2018, along with the diplomatic privileges and immunities of any person who was recognised by the FCO as being a member of her family and who formed part of her household, within the meaning of Article 37(2) of the Vienna Convention on Diplomatic Relations 1961."

24. Finally, S had returned to the care of his mother on 21 December 2017. S had been very settled in foster care but his foster carer was unexpectedly unable to care for him because of family illness and he was placed in a respite placement for what was intended to be a limited period of time. S was unhappy with the respite carers and refused to stay in that placement, instead returning to his mother's home. S remained in his mother's care under the auspices of an interim care order.

SUMMARY: THE PARTIES' POSITIONS

25. The local authority submitted that, on consideration of the balance of risk and the best interests of each of the children, the court should make no order in respect of any of the children. Though the local authority accepted the mother still needed to complete the work recommended by Dr Van Rooyen, it proposed to work with the mother and rehabilitate the children to her care within a relatively short timescale. It hoped that, until such time as E and SL returned to her care, the mother would agree to them remaining in foster care pursuant to s.20. The plan was for both E and SL to begin overnight contact

and to move to the full-time care of their mother within a period of six weeks following the conclusion of the care proceedings. If the court did not endorse this plan and made care orders in respect of one or more of the children, the local authority would seek to place the children in a single long-term foster placement.

26. The local authority contended that the certificate issued by the FCO on 8 February 2018 was conclusive proof only that the mother's functions with the X High Commission ended on 31 December 2017. It submitted that the certificate was not conclusive evidence that the mother's diplomatic privileges and immunities ended on 31 January 2018. The "reasonable period" available to the mother in which to leave the UK following the end of her functions was a matter ultimately for the court to decide. In the circumstances of this case, the local authority suggested that the "reasonable period" for the mother to leave should take into account the need for her to attend the proceedings and to continue to be in the UK for an appropriate time thereafter. If the court were of that view, the local authority submitted that the impact of diplomatic immunity on the making of final care orders would need to be addressed by the court. The local authority submitted that D and S were clearly members of the mother's household and thus had the same diplomatic status as she did. The local authority also submitted that E and SL were members of the mother's household even though they remained living with short-term foster carers and thus that they too enjoyed diplomatic immunity. It was the local authority's contention that, if all four children had the benefit of diplomatic immunity, that the court had no jurisdiction to make final care orders in respect of these children.

27. The mother endorsed the position adopted by the local authority and submitted that final care orders should not be made because the effect of diplomatic immunity created a bar to the enforcement of final care orders. The mother sought the return of the children to her care and hoped it would be possible for all the children and for her to remain in this jurisdiction for the foreseeable future.
28. On behalf of D and S, it was submitted that neither wished to return to X and both wished to remain living with their mother in the UK. The court was invited to make a final care order in respect of S on the basis that he remained at home with his mother. If she had to return to X, the contingency plan for S should be for him to remain in long-term foster care in the UK. With respect to the legal issues, D and S submitted that the mother's diplomatic immunity had not come to an end on 31 January 2018 because the "reasonable period" extended to the period necessary to participate in these proceedings and to maintain any contact needed to ensure that any order was effective. It was further submitted that diplomatic immunity was irrelevant to the jurisdiction of the court and that there was no restriction on the powers of the family court to enforce its orders.
29. The Children's Guardian was opposed to E and SL returning to the care of their mother either in this jurisdiction or in X until such time as the mother had completed the work recommended by Dr Van Rooyen and the situation could be reassessed. In essence, the Guardian supported the care plans for the children deemed to be in the children's best interests by the local authority in early October 2017 when the proposal was to rehabilitate the children over a

lengthy timescale of 6 to 9 months. As far as S was concerned, the Children's Guardian was supportive of S remaining in the mother's care but only if the legal framework governing his placement was that of a final care order and the mother remained living in UK. If the mother were to return to X, the Children's Guardian supported a final care order being made on a plan for S to return to foster care. The Children's Guardian invited the local authority to provide D with whatever support it could, including an exploration of his housing options and how he might meet his living expenses.

30. The Children's Guardian submitted that the court had jurisdiction to make final care orders and for these to be executed on the basis that the mother was permanently resident in this jurisdiction and/or that the children, E and SL in particular, had ceased to be members of the mother's household at the time the care proceedings were instituted. Following oral submissions on the legal issues in this case, Mr Momtaz QC abandoned his reliance on the submission that the mother was permanently resident in this jurisdiction. He adopted the submissions made by the Secretary of State for the FCO with respect to the children's diplomatic immunity and the effect of the certificate issued on 8 February 2018.
31. The Secretary of State for the FCO's submissions were confined to the legal issues. It was submitted that the certificate issued on 8 February 2018 was conclusive proof of the facts therein stated. The mother's diplomatic immunities and privileges had expired on 31 January 2018 as certified. If the court were to consider that the reasonableness of the period to be allowed was a matter for the court to assess in the circumstances of a particular case, the

Secretary of State submitted that 31 days was a reasonable period as a normal policy in the particular circumstances of this case in that it was a sufficient period to conclude matters arising from the mother’s diplomatic appointment. The skeleton argument submitted by the Secretary of State also contended that, when the children moved to foster placements in November 2016, they ceased to be part of the mother’s household. D and S, both of whom had returned to the mother’s household, had thus regained the same status in this jurisdiction as that enjoyed by the mother. The position of E and SL was different as they had remained in foster care throughout. The Secretary of State submitted that diplomatic immunity was irrelevant to the court’s power to make final care orders as neither the mother nor any of the children had enjoyed any diplomatic immunity or privileges since, at the very latest, 31 January 2018.

THE LEGAL ISSUES

The Law

32. The primary international legal instrument is the Vienna Convention on Diplomatic Relations 1961 [“VCDR”]. Article 10 provides in part that:

Article 10

“1. The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of:

(a) The appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;

(b) The arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission... ”

The VCDR has effect in the UK pursuant to the 1964 Act. Section 2 of the 1964 Act provides that certain Articles of the VCDR set out in Schedule 1 to the 1964 Act shall have the force of law in the UK. The Articles in Schedule 1 are Articles 1, 22-24, 27-40 and 45 of the VCDR.

33. So far as is relevant, Articles 31, 37 and 39 provide as follows:

Article 31

“1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

[...]

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.

[...]

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

Article 37

[...]

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties...

Article 39

[...]

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.”

34. Section 4 of the 1964 Act makes provision as follows:

“4. Evidence

If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under this Act a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question shall be conclusive evidence of that fact.”

35. It is the FCO's policy that, pursuant to Article 39(2) of the VCDR, individuals who enjoy privileges and immunities by reason of their diplomatic functions shall cease to enjoy them when they leave the country, or alternatively shall normally be considered to have ceased to enjoy them 31 days after their functions (or those of the person from whom that individual derives their privileges and immunities, in the case of a family member) come to an end.
36. The Immigration Act 1971 ["the 1971 Act"] makes provision for the immigration status of persons who are or have been within the scope of the 1964 Act (and so exempt from the 1971 Act) as follows:

"8 – Exceptions for seamen, aircrews and other special cases.

[...]

(3) Subject to subsection (3A) below, the provisions of this Act relating to those who are not British citizens shall not apply to any person so long as he is a member of a mission (within the meaning of the Diplomatic Privileges Act 1964), a person who is a member of the family and forms part of the household of such a member, or a person otherwise entitled to the like immunity from jurisdiction as is conferred by that Act on a diplomatic agent.

(3A) For the purposes of subsection (3), a member of a mission other than a diplomatic agent (as defined by the 1964 Act) is not to count as a member of a mission unless –

(a) he was resident outside the United Kingdom, and was not in the United Kingdom, when he was offered a post as such a member; and

(b) he has not ceased to be such a member after having taken up the post

[...]

8A – Persons ceasing to be exempt.

(1) A person is exempt for the purposes of this section if he is exempt from provisions of this Act as a result of section 8(2) or (3).

(2) If a person who is exempt –

(a) ceases to be exempt, and

(b) requires leave to enter or remain in the United Kingdom as a result, he is to be treated as if he had been given leave to remain in the United Kingdom for a period of 90 days beginning on the day on which he ceased to be exempt.”

In addition to the 31 days described above, the policy of Her Majesty’s Government is that an individual previously exempt from immigration control by reason of section 8 of the 1971 Act will be treated as having 90 days leave to remain in the UK, pursuant to section 8A of that Act.

Discussion

37. The legal issues arising from the certificate issued on 8 February 2018 by the FCO were defined as follows:

(a) Whether the certificate was determinative of the date when the mother ceased to enjoy diplomatic privileges and immunities;

(b) If not, what was the duration of the reasonable period under Article 39(2) of the VCDR in the circumstances of this case;

(c) whether the FCO's view that the children ceased to be members of the mother's household in November 2016 when they went to live with short-term foster carers was correct;

(d) If so, whether D and S became members of the mother's household again when they returned to live with the mother in July 2017 and December 2017 respectively;

(e) If not, whether the children have remained members of the mother's household throughout or whether they ceased to be members of the mother's household at some other time and, if so, when;

(f) and whether the court's power to make care orders was affected in any way by the existence of diplomatic immunity and privileges as a matter of principle.

(a) The February Certificate

38. The FCO submitted that the February certificate was conclusive proof of the facts therein stated. This was consistent with the clear and unambiguous terms of s.4 of the 1964 Act which provides that "*any fact relating*" to a question of entitlement to "*any privilege or immunity*" shall be conclusively evidenced by such a certificate. It was submitted that Parliament's intent in section 4 was to attain the highest degree of evidential certainty in matters relating to privileges and immunities, in accordance with the purpose of the 1964 Act, namely to give effect to the UK's obligations under the VCDR and to ensure the efficient

performance of the functions of diplomatic missions. The authoritative commentary on diplomatic law by Eileen Denza [Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 1961 – 4th edition, OUP 2016] set out the UK practice on such certificates as follows:

“Certificates under the Diplomatic Privileges Act are rigorously confined to questions of fact within the special knowledge of the Foreign and Commonwealth Office, such as notifications of appointments of members of diplomatic missions. Questions of law such as whether the defendant is permanently resident in the United Kingdom are left to the courts, though in appropriate cases facts relevant to these questions might be covered in a certificate.”

39. In this case, paragraphs one and two of the February certificate certified two facts: firstly, the date upon which the mother commenced her appointment as a member of the administrative and technical staff at the X High Commission; and, secondly, the date upon which her functions with the mission had terminated. There was no dispute about either paragraph. Whether, however, paragraphs 3 and 4 of the certificate certified a fact, namely the date upon which the mother’s diplomatic privileges and immunities ended was a matter of contention.
40. I was referred to the decision of the Court of Appeal in Estrada v Al-Juffali (Secretary of State for Foreign and Commonwealth Affairs intervening) [2016] EWC Civ 176 where the Court of Appeal considered the equivalent provision (section 8) in the International Organisations Act 1968, which is expressed in materially the same terms as section 4 of the 1964 Act. In Estrada

the relevant certified facts were three dates, namely the date upon which the appointment of Dr Al-Juffali as the permanent representative of St Lucia to the International Maritime Organisation began; the date upon which his arrival was notified to the FCO; and that there was no termination date applicable to Dr Al-Juffali's diplomatic functions. Lord Dyson MR set out the compelling policy reasons for the conclusiveness of the certification of facts in paragraph 41 of Estrada, namely:

“Section 8 of the 1968 Act provides that, if a question arises in any proceedings before the English courts as to whether a person is entitled to any privilege or immunity, a certificate issued under the authority of the Secretary of State stating any fact relating to that question shall be conclusive evidence of that fact.... The policy reasons justifying the conclusiveness of FCO certificates has been discussed most frequently in the context of issues relating to state immunity. For example, in The Arantzazu Mendi [1939] AC 256, 264 Lord Atkin said:

‘Our state cannot speak with two voices on such a matter [that is state sovereignty and matters flowing from it], the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognise as a fellow sovereign in the family of states; and the relations of the foreign state with ours in the matter of state immunities must flow from that decision alone’
...”

By direct analogy, I have no doubt that the same policy reasons apply to FCO certificates issued pursuant to the 1964 Act.

41. The FCO submitted that the effect of robbing s.4 of the 1964 Act of its force would be detrimental to the conduct of foreign relations. It was imperative to ensure that the control mechanism for the termination of privileges and immunities be left in the hands of the FCO as this “*avoids the risk of inconsistency and leaves the exercise of the prerogative untrammelled by a rival judicial enquiry*” [per Blake J in Al Attiya v Bin-Jassim Bin-Jaber Al Thani [2016] EWHC 212 QB at [77] quoted with approval by Lord Dyson MR in paragraph 33 of Estrada]. It was submitted that paragraph 4 of the February certificate certified the date upon which the mother’s diplomatic privileges and immunities came to an end, this being a date arising from a treaty provision and a policy designed to give effect to it. This fact must be considered in its appropriate context and consistently with a statutory scheme founded on the policy considerations identified in The Arantzazu Mendi.
42. The Estrada case is not precisely on all fours with the circumstances arising in this case. In Estrada the Court of Appeal held that the judge was wrong to investigate the question of whether Dr Al-Juffali had exercised or discharged the functions of a permanent representative. The Court cautioned against the dangers which might arise in those circumstances: for example, the position of the UK’s diplomats and permanent representatives in other countries might be scrutinised, and their status unjustifiably curtailed, by the courts of receiving states asserting a power to undertake a functional review. The conduct of foreign relations and the work of international organisations could be seriously hampered if the acceptance of accreditation of diplomats and permanent representatives was not regarded as conclusive, but was open to scrutiny by the courts [Estrada, paragraph 24].

43. In this case however the dispute concerned what was a reasonable period within which to bring the mother's diplomatic rights and privileges to an end. That was different to a dispute, for example, about the date upon which a diplomat arrived or took up his/her diplomatic functions or the date at which those functions came to an end. I find that the language of the February certificate as set out in paragraphs 3 and 4 did not describe facts alone. Rather it set out what was a mixed question of fact and law: the fact being the date the diplomatic rights and privileges of the mother terminated but that fact being dependent upon what the UK Government considered to be reasonable within Article 39(2) of the VCDR. Mr Verdirame on behalf of the FCO conceded that "*reasonableness*" was not a question of fact but rather an interpretive question of law. He was, in my view, right to make that concession. The 1964 Act does not set out a precise time limit for the termination of diplomatic rights and privileges as is the case for example in Switzerland (6 months) or Venezuela (one month). In the absence of such a statutory provision, the question of what constitutes a reasonable period may be determined by national courts if a dispute arises.
44. I therefore determine that the February certificate was not per se determinative of the date when the mother ceased to enjoy diplomatic privileges and immunities. The reasonableness of the period pursuant to Article 39(2) in this particular case was ultimately a matter for the court to scrutinise and determine.
45. If reasonableness was a matter for the court to assess, what were the key considerations in the circumstances of this particular case? First, I find that the

reasonable period pursuant to Article 39(2) must be strictly and exclusively for the purposes of the duration of VCDR privileges and immunities. To exercise powers consistently with the purposes of the 1964 Act, the Secretary of State is required to determine such matters by reference to considerations of diplomatic immunity and privilege. That determination of reasonableness must be made in the context of inter-state diplomatic relations and on the basis of matters that the Executive is best placed to consider.

46. Second, even if the Secretary of State's view as expressed in the certificate was not conclusive, I accept the submission by the FCO that it was thoroughly and critically relevant. The Secretary of State has a clear and consistent policy, which is designed to enable proper functioning of diplomatic relations. Though that policy may be subject to exceptions in certain cases in accordance with general public law principles, I find that such exceptions should relate only to diplomatic relations and the purpose for which VCDR immunities and privileges were properly conferred.
47. Mr Southey, supported by the local authority, submitted that the reasonable period provided for within Article 39(2) could extend for a considerable period. Read in context, he submitted that it was intended to allow those previously carrying out diplomatic functions a reasonable period in which to resolve the loose ends which would inevitably have arisen following a period of diplomatic service. He suggested that if, for example, a diplomat's children had been educated for a significant period within the UK education system, it would not be reasonable to deny immunity for the period necessary to complete a key stage in the children's education (such as examinations).

Denial of immunity would impede the effective conduct of diplomacy by acting as a disincentive to people with families serving as diplomats. He also submitted that, in this case, the FCO should have made enquiries of the X High Commission as to whether the public law proceedings relating to the children had concluded. He reminded me that the FCO knew about proceedings, having issued a certificate in December 2017 confirming that the FCO had not been notified of the termination of the mother's functions with the X High Commission.

48. Though Mr Southey's submissions were attractively put, I have concluded that the FCO was not obliged to make enquiries of the X High Commission about the state of the care proceedings. Those matters were not germane to the mother's exercise of her duties which attracted diplomatic privileges and immunities by reason of Article 31(1)(c) of the VCDR. I accept the submission that the purpose of Article 39 is to facilitate the orderly departure of a person with diplomatic privileges and immunities from a receiving state but that Article must be interpreted in the light of the Recitals to the Vienna Convention, one of which states "*... the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States*". It seems to me that considerations irrelevant to the mother's exercise of her duties were not matters that the FCO was obliged to take into account when determining the ambit of a reasonable period beyond which the mother's diplomatic privileges and immunities should come to an end. Support for that interpretation is found in paragraph 17 of the judgment of Lord Sumption JSC in Al-Malki and another v Reyes (Secretary of State for Foreign and Commonwealth Affairs

and another intervening) [2017] UKSC 61 where the Court observed that Articles 31 to 40 of the Convention represented an elaborate scheme which must be examined as a whole. Fundamental to its operation was the distinction, which runs through the whole instrument, between those immunities which were limited to acts performed in the course of a protected person's functions as a member or employee of the mission, and those which were not. The distinction was fundamental because what an agent of a diplomatic mission did in the course of his official functions was done on behalf of the sending state. By comparison, the acts which an agent of the diplomatic mission did in a personal or non-official capacity were not acts of the state which employed him. They were acts in respect of which any immunity conferred on him could be justified only on the practical ground that his exposure to civil or criminal proceedings in the receiving state, irrespective of the justice of the underlying allegation, was liable to impede the functions of the mission to which she/he was attached.

49. In conclusion and in answer to the first two legal questions posed, I find that the diplomatic rights and privileges enjoyed by both the mother and the children came to an end on 31 January 2018 as certified in the February certificate.

(b) The Children's Status

50. The immunity and privileges conferred by Article 37(2) extends to "*members of [the] families forming part of [the] respective households*" of members of administrative and technical staff. The FCO's skeleton argument submitted that the children fell outside this category when they were placed with short-

term foster carers in November 2016, because they ceased to be co-resident dependents. Having heard the submissions of the other parties, Mr Verdirame wisely abandoned that submission.

51. The wording of Article 37(2) is clear and, on the face of it, forming part of the household is a qualifier on the broader category of family members. There are a number of cases about whether an individual forms part of a diplomatic household or belongs to a diplomatically immune family both before and after the passing of the 1964 Act. Thus, in Engelke v Mussman [1928] AC 433 the immunity of family members of an ambassador was described in the following terms: “*his personal family, that is to say, his wife and his children if living with him*” [at 450]. In Re C (An Infant) [1959] Ch 363 at 367, it was held that the child was “*a member of his father’s family in one sense, but not, I think, for the present purpose unless he is ordinarily resident with, or is under his father’s control*”. In Apex Global Management Ltd v Fi Call Ltd and others [2013] EWCA Civ 642 at [22]-[23], the Court of Appeal held that “*the practice of the United Kingdom Government in this regard was to treat members of the family forming part of the household as including the spouse, civil partner and minor children of the diplomat and, in exceptional circumstances, older children resident with and financially dependent on the diplomat, while in full-time education, and a dependent parent of a diplomat normally resident with him or her..... A common theme in all these formulations is that the central criterion for the extension of personal immunity to family members of the diplomat’s household (apart perhaps from spouses) is dependence, rather than the performance by any such persons of diplomatic duties or functions on the diplomat’s behalf.*”

52. The FCO identified that the central themes in the case law were dependence and/or co-residence. On the case law summarised above, I find that all of the children were aged under 18 and were thus minor dependent children of the mother sharing the same diplomatic privileges and immunities.
53. Mr Newton QC and Mr Southey QC submitted that a temporary period of non-residence should not alter this status. The purpose of Article 37(2) was to ensure that family units were protected by diplomatic immunity. The commentary in Denza at page 238 noted that the extension of immunities and privileges to spouses and families had been long established and that families were essentially seen as extensions of the persons of diplomats themselves. Denza noted that the spouse of a diplomat not legally separated from him or her was universally accepted as a member of the family as were children below the age of majority. I find that the objective behind Article 37(2) would be undermined if an interim care order or any other form of interim order could deprive some family members of diplomatic immunity. It is axiomatic that, when interim care orders are made on a plan for children to remain in foster care, no final conclusions will have been reached as to whether or not the children should be reunited with their mother.
54. Re B (Care Proceedings: Diplomatic Immunity) [2002] EWHC 1751 (Fam), [2003] 1 FLR 241 considered the making of an interim care order in respect of a 13-year-old child of a member of the administrative and technical staff of a foreign mission who was found to have suffered serious non-accidental injuries consistent with repeated and severe hitting. The father and his family were accepted as having no immunity from care proceedings, which were civil

proceedings, provided that they related to acts performed outside the course of the duties of the father. It was not suggested the beating and bruising of the child came within the scope of the duties of the father, and on this basis the court found the father, mother, and the child had no immunity from family proceedings and so continued the interim care order with the child being placed in foster care. Nothing in that decision suggested that the child lost her diplomatic rights and privileges by reason either of being the subject of an interim care order and/or being placed with foster parents [see paragraph 17].

55. In the light of the above, I have concluded that the children remained dependent upon the mother throughout the involvement of the local authority and thus did not cease to be members of her household. I observe that the original submission made by the FCO would have led to illogical outcomes at different points in the proceedings for some of the children with whom I am concerned. Thus, D was now part of the mother's household as he was living with her and was dependent. He was said to have lost his status when placed pursuant to s.20 but then presumably regained it when he returned to live with his mother in July 2017. Likewise, E and SL were said to have lost their status in November 2016 though at that stage they were not the subjects of interim care orders and remained dependent upon the mother by reason of her consent to s.20 accommodation. S was said to have lost his status in November 2016 when he was accommodated and was said to have regained it when he returned to live with his mother in December 2017 even though he remained the subject of an interim care order. The FCO's initial analysis which focused solely on dependence/co-residence of minor children ran the risk of creating

haphazard and inconsistent outcomes given what were short lived changes in the children's circumstances.

56. My conclusion that the children remained within the mother's household throughout the involvement of the local authority avoids the risk of uncertainty in determining the status of a minor child in circumstances such as these where the family court has not made a final determination within public law proceedings. All the children thus retained the same privileges and immunities as their mother.

The Effect of Diplomatic Immunity on the Court's Jurisdiction

57. Given the conclusions I have reached, neither the mother nor the children retained their diplomatic privileges and immunities which were lost on 31 January 2018.
58. That conclusion does necessarily permit the court to make final care orders. Both Mr Newton QC and Miss McKenna QC sought to persuade me that the court had no jurisdiction to do so if the children retained their diplomatic privileges and immunities. Even if they do not, as I have found, there may be other obstacles to the court's jurisdiction.
59. The decision of the then President of the Family Division, Lady Justice Butler-Sloss, in Re B [see above] suggested that there might be limits to the court's power to enforce either interim or final care orders. Arguments that the court had no jurisdiction to make care orders were rejected in that case. The President considered Article 29, Article 30, Article 31 and Article 37(2) in coming to the following conclusion:

“17. The father is within the group of administrative and technical staff of the embassy. Consequently, he and his wife and children enjoy, as I understand it, the following privileges under the 1964 Act which are relevant to these proceedings. His person is inviolable. His private residence is inviolable. He has immunity from criminal proceedings and is not obliged to give evidence in any proceedings. No measures of execution can be taken against him. He and his family are not, however, immune from civil proceedings in the case of acts performed outside the course of his duties. It has not been suggested to me that the beating and bruising of B come within the scope of the duties of the father. Prima facie, it would therefore appear on the written evidence before me that the father has no immunity from family proceedings, including care proceedings which are civil proceedings. This loss of immunity would also seem to apply to the mother and to B, who derive their immunity from the father.”

The President went on to consider whether she was able to make orders which could not ultimately be enforced. She did not find this to be an impediment and concluded that the making of an interim care order fell within the exception to Article 37(2) of the 1964 Act. She went on to consider whether the child was being detained under the interim care order and concluded that the child’s present situation did not breach her rights under Article 29 of the VCDR [paragraphs 32 and 35].

60. Having come to those conclusions, the President recognised that there were limits to the power of the court to enforce any orders which might be flouted by either of the parents [paragraph 37]. Though it was not strictly necessary

for her to consider the impact of the European Convention on Human Rights on the 1964 Act, she expressed the opinion that the European Convention Article 3 rights of the child had been breached. In those circumstances, the court as a public authority had a positive obligation to protect a child who had been exposed to abusive treatment which appeared to fall within article 3. Her final conclusion on the court's jurisdiction reads as follows:

"40. ... if I were wrong in the view I have taken of the Diplomatic Privileges Act 1964, leaving this court with jurisdiction to entertain the local authority's application, I would find myself satisfied that such a result is necessary in order to read the 1964 Act in a way that is compatible with the Human Rights Act 1998."

I respectfully adopt that analysis which also applies to the making of final care orders.

61. In this case I am being asked to make final care orders in respect of S, E and SL. That course is opposed by the local authority and by the children's mother. I have concluded that I do have the jurisdiction to make final care orders in respect of these children in circumstances where they have lost their diplomatic privileges and immunities. Though I was not required to do so, I would have come to the same decision if the children had retained their diplomatic privileges and immunities. My reasoning is as follows.
62. The President in Re B held that any limitation on the power to enforce orders should not prevent orders being made. In that case there was little argument regarding enforcement and, in consequence, I do not regard the remarks made about the power of enforcement as determinative of the issue. It would be

surprising in my view if the provisions of Article 37(2) permitted proceedings to be brought but did not also permit consequent orders to be enforced. It would also be contrary to the rule of law for a court to determine a person's legal rights and then not enforce them. Principles such as the rule of law are well recognised in international law and are relevant, in my view, when interpreting the provisions of Article 37(2). In Jelicic v Bosnia (2008) 47 EHRR 13, European Court of Human Rights held that there had been a breach of Article 6(1) for the failure to enforce a final judgement in respect of the contents of a bank savings account. The Court declared in paragraph 38 as follows:

“The Court reiterates that Art.6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a contracting state’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Art.6(1) should describe in detail the procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions. To construe Art.6 as being concerned exclusively with access to a court and the conduct of proceedings would indeed be likely to lead to situations incompatible with the principle of the rule of law which the contracting states undertook to respect when they ratified the Convention. Execution of a judgment given by any court must

therefore be regarded as an integral part of the “trial” for the purposes of Art.6.”

63. In this context I note that Article 31(3) of the VCDR contains no prohibition on enforcement for diplomatic agents in proceedings under the civil and administrative jurisdiction of the receiving state in respect of actions relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside of his official functions [Article 31(1)(c)]. That Article also extends to members of the administrative and technical staff of a mission who do not enjoy immunity for acts performed outside the course of their duties. It is plain in this case that the mother’s behaviour towards her children was not within the course of her duties as a member of the administrative and technical staff of X High Commission. There was nothing in Article 31(1)(c) which prevented the enforcement of care orders in public law proceedings and the enforcement of such orders would, in my analysis, also be compatible with Article 29 which provides for the inviolability of the person of the diplomatic agent who shall not be liable to any form of arrest or detention.
64. The local authority, supported by the mother, sought to argue that the provision of foster care for the children comprised an element of detention contrary to Article 29. I do not accept that submission and neither did the President in Re B. The children presently placed in foster care were not locked in or prevented from leaving the home and therefore their present situation fell very far short of a breach of any rights they might have under Article 29 of the VCDR. That conclusion was supported by the judgment of the current

President of the Family Division in in Re A-F (Children) [2018] EWHC 138 (Fam) [see paragraphs 37-44]. There was nothing in the children's circumstances in foster care which amounted to a deprivation of their liberty or an infringement of any rights they might have pursuant to Article 29 of the VCDR.

65. Did the mother retain any residual rights and privileges which might prevent the making a final care orders in this case? Article 39(2) provides that, when the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country or an expiry of a reasonable period in which to do so but shall subsist until that time even in case of armed conflict. However, with respect to acts performed by such person in the exercise of his functions as a member of the mission, immunity shall continue to subsist. Here, it is clear that the mother's residual immunity did not extend to acts performed outside the course of her duties such as are engaged in these proceedings.
66. In conclusion I find that, should I consider the children's welfare so requires, I have the jurisdiction to make final care orders in respect of these children, all of whom have lost their entitlement to diplomatic privileges and immunities as has their mother.

THE WELFARE ISSUES

Preliminary Observations

67. My judgment in October 2017 recorded the basis upon which the threshold criteria were satisfied. To summarise, the children had suffered significant

physical and emotional harm as a result of the mother having smacked and slapped all of them; having hit all of the children with a belt using up two or three strikes; having thrown a shoe at D's head causing injury; having shouted at D and threatening to send him to X if he did not behave and thereby scaring him; and having threatened to cut D's hair as a punishment. That abusive behaviour towards the children was to be addressed by the mother engaging in therapeutic work, a detailed programme of which had been endorsed by me in my judgment. At that time, the mother had expressed a willingness to commit herself to the therapeutic work required. It is important to bear the above in mind when assessing the situation now.

68. Hanging over the proceedings was the distinct possibility, if not probability, that the mother would have to return to X. The FCO's certificate in February 2018 made clear that, upon the expiry of the mother's diplomatic privileges and immunities on 31 January 2018, the mother would be able to remain lawfully in this jurisdiction until 1 May 2018. The issue of that certificate rendered the mother's return to X a probability which, in my view, cannot sensibly be ignored. A return to X was not an outcome desired by any of the children or indeed by the mother. She told me in her evidence she would feel under an obligation to accept recall to X as she was a serving member of the armed services of that country. If she did not return when ordered to do so, her already limited salary would be forfeit and she would have no practical means of supporting herself either in this jurisdiction or in X. The mother in her statement described a profoundly unsettled situation in X, part of which was a war zone, with widespread civil unrest in other parts of the country. However,

her own home in X was not within the war zone and was close to where other family members lived.

69. I said in October 2017 that the imminence or not of the mother's recall to X was an important factor to which I must have regard but that it was not determinative of the children's welfare. My decision must be governed by the paramountcy of their welfare. The decision in In the matter of A (Children) Rotherham Borough Council v M and N and the Secretary of State for the Home Department [2003] EWHC 1086 (Fam), reported as Re A (Care Proceedings: Asylum Seekers) [2003] 2 FLR 921 comprehensively addressed the interplay of Children Act proceedings and immigration issues. Munby J, as he then was, refused to allow public law proceedings to continue in circumstances where it was perfectly obvious that the parents' only purpose in seeking to continue the proceedings was to frustrate the removal process and to prevent for as long as possible, and if possible indefinitely, the family's return to another jurisdiction. The court emphasised that a judge of the Family Division could not make an order which had the effect of depriving the Secretary of State of her power to remove a child or any other party to the proceedings whatever jurisdiction the court might be exercising. Though the circumstances here are different to those in Re A, the overarching principle set out in that decision remains good law.
70. I record that the Children's Guardian has been criticised by the mother and the local authority. These criticisms were in effect (a) that she failed to meet with the children's mother until August 2017 at which time the proceedings had been ongoing for many months; (b) in consequence, she had an inadequate

understanding of the mother; (c) further, she had an inadequate understanding of the home circumstances and any change in those by not meeting with C, the children's older sister, until 3 February 2018; (d) she entertained an unrealistic doubt in the mother's obligation to return to X; and (e) she had a belief that X was a dangerous country per se where any children should not be required to live regardless of the quality of parenting they might receive. It was asserted that, for those reasons, I should approach her evidence with a considerable degree of caution.

71. I received two letters, one from E and one from SL. SL told me that she wanted to return to her mother's care whereas E expressed strongly that she did not wish to return to her mother's care at all and wanted to stay in foster care. If that happened, she said that she did not want to see her mother until she was 18.
72. Finally, following the conclusion of the evidence and of the welfare submissions, I was told about two incidents, one on 17 February 2018 and one on 2 March 2018. First, E and SL had thought S had been physically chastised by the mother whilst they were in the family home for a contact visit. They had not seen any such chastisement for themselves and S did not confirm that he had been hit by his mother. Second, D had alleged that, during a row about whether he should go out, the mother had ripped his jacket as she was trying to stop him from leaving the family home. D was recorded to have initially said that the mother had picked up a knife to threaten him but he later clarified this by saying that the mother was already holding a knife as she was cooking in the kitchen when the argument took place. All of the parties accepted that the

family were under a considerable degree of strain at this moment in time. I was not in a position to make findings about either alleged incident and thus can give little or no weight to what is said to have happened in coming to my decision.

The Evidence

73. The social worker was a sensible and insightful professional committed to working with the mother and the children. She told me that the mother had lost focus following the hearing in October 2017. It was her assessment that the mother had not engaged with the therapeutic work outlined in my October 2017 judgment so that the children could remain in the care of the local authority rather than returning with her as a family to X. If the mother had not been recalled to X, it was the social worker's opinion that she would have engaged in the work required. She thought that the risk of physical chastisement had reduced and was now minimal and that the risk of emotional harm to the children had reduced somewhat. She accepted that the mother had a lot of work to do. Cultural differences meant that the work necessary to reunite this family would take longer.
74. There had been some positive changes in contact since it had taken place in the family home. However, both the girls had made it clear to her that they did not feel the mother had apologised to them for her behaviour and the social worker accepted that an apology from the mother was needed. E, in particular, needed a great deal of sensitive support. S's return home had gone well although it had not been planned and the social worker thought his return home was a positive sign for the future.

75. The social worker was the author of the local authority's care plans which were predicated upon all the children living with their mother within a period of some six weeks following the conclusion of the proceedings. Sensibly and realistically, the social worker acknowledged that this timescale was optimistic. She told me that the mother needed time to get over the pressures generated by the court proceedings and an ideal rehabilitation timescale would be between 6 to 9 months. It was the social worker's assessment that the mother could manage the work required of her within that time. Nevertheless, she maintained that if the mother had to leave this jurisdiction to return to X prior to all the work necessary being completed, the children should not be separated from her as it would be extremely damaging for them to lose both mother, country, and culture.
76. In cross-examination by Mr Momtaz QC, the social worker accepted that the mother had not engaged and that she needed to demonstrate to the local authority what she could do as a parent. She accepted that it would be very unwise to return E, in particular, before the mother had done this. She confirmed that it would be desirable to have more time to work with the mother.
77. I heard briefly from the mother's parenting social worker. He confirmed that, as far as he was aware, there had been no clashes between the mother and D and S which had been brought to his attention. His work with the mother's older daughter had been very successful. Given the truncated timetable advanced by the local authority for rehabilitation, he thought a period of eight weeks with sessions for the mother twice each week would enable sufficient

progress to be made so that the children could return to her care. He accepted that the pressures on the mother were complex and that it had been disappointing that the mother had not engaged with him at the end of 2017.

78. The local authority's family finding social worker confirmed that the foster carer for E and SL was unable to provide a long-term home for both girls. The local authority currently had no placement available to it which could accommodate S, E and SL together. There were however three potential placements for S in-house and there had been a great deal of interest from independent fostering agencies in a placement for E and SL without their brother.
79. Dr Van Rooyen confirmed that there had been a shift in the mother's behaviour and attitude since she last saw her in October 2017. She agreed that the mother appeared to be caring for D and S without the risk of physical chastisement manifesting itself. It was her opinion that the risk of physical chastisement had substantially reduced but had not disappeared altogether. As far as the issue of emotional harm was concerned, the mother needed to apologise to the children for her behaviour so that the children accepted this and she needed to work upon her empathy and understanding of the children's perspective.
80. On balance, the work with the mother was possible. Dr Van Rooyen felt that it was a fine balance in respect of the risks to the children of not returning to the care of their mother versus a return to her care. Dr Van Rooyen also accepted that she had no enthusiasm to keep the children separated from their mother and that they should be with her provided that basic work was done to repair

their relationship. The mother, in her view, had accepted that she should not physically chastise the children but it was unclear whether she saw such chastisement as emotionally harmful. Dr Van Rooyen still worried that the mother struggled with the capacity to empathise with the children. The work that was required of the mother to prevent future emotional harm to the children was the very basic minimum and the timescale required should be measured in months rather than weeks. She thought it would be helpful to the family to know for certain what would happen in respect of the mother's return to X.

81. The mother gave evidence to me at some length. Despite the difficulties consequential upon the use of an interpreter, the mother gave her evidence with patience and good humour. At times she was visibly moved and I observed the emotion on her face and the warmth in her voice when she spoke about her children. Although she told me that she accepted she was responsible for the children being in care, she had some difficulty in identifying the mistakes she had made as a parent. When taken by Mr Momtaz QC to the agreed threshold document, the mother resiled from one of the concessions that she had made. She said that she did not hit all the children with a belt but had only hit D and E in that manner.
82. The mother told me on more than occasion during her evidence that she had learned that hitting the children was not good and that she would not do this in future wherever she lived. She said that she had apologised to the children at a contact session before August 2017. She was, however, reluctant to consider apologising again to the children because this would feel like she had been

asked “*to bow down again in front of them*” but she would do so notwithstanding her feelings. She told me that she would cooperate with the parenting work required of her though her insight into the emotional harm experienced by the children appeared to be rather limited. She was very upset indeed about some of the things E was reported to have said and written and was unable to accept that E had done so. The mother confirmed that she would work with the parenting social worker as requested by the local authority but said that she lacked the motivation to do this work if she had to go back to X in the immediate future.

83. Finally, I heard from the Children’s Guardian. She confirmed that her recommendation was for the two younger children to be the subjects of care orders based on a plan which attempted to rehabilitate them to their mother’s care within a timeframe of 6-9 months. In respect of S she confirmed her recommendation that he remain in his mother’s care subject to a care order and that he only be moved to live in foster care should his mother return to X. She expressed concern about the mother’s acceptance of the threshold document and felt that, despite her best intentions, the mother might use physical chastisement against the children if overcome with her own feelings. She could not recommend the return of the children to the mother at this stage because there were risks of physical and emotional harm which she said could not be sensibly ignored. The mother needed to engage with work to address those issues but, having heard the mother’s evidence, the Children’s Guardian was not confident that she could do so successfully in the short timescale envisaged by the local authority. She confirmed that SL had told her the

mother had apologised to her during contact though this had not been confirmed by E.

84. The Children's Guardian emphasised that her recommendation was not significantly different from that of the local authority save that it envisaged a longer timeframe for work with the mother buttressed by the making of public law orders. If the children had to remain in foster care, she would prefer the children to be placed together but recognised that it might be difficult to achieve this. She was opposed to the children returning to X even if this meant that they lost contact with their mother.

Discussion

85. The legal framework I must apply is clear. The children's welfare must be my paramount consideration according to s.1(1) of the Children Act 1989 and I must have regard to the checklist set out in s.1(3). I must not make any order unless I consider that doing so would be better for the children than making no order at all. I have also taken into account the importance of giving full weight to the significance of a family placement, unless this is established to be so contrary to a child's welfare that a long-term placement in public care or adoption is necessary [see Re M'P-P [2015] EWCA Civ 584 per McFarlane LJ]. I have also had regard to Article 8 of the European Convention on Human Rights, namely the right to respect for private and family life, and to Article 6 of that Convention, namely the right to a fair hearing.
86. I was urged by the Children's Guardian and, to a lesser extent, by D and S, to rely on circumstances in X, together with the children's and the mother's anxieties about those circumstances, as establishing a risk to the children of

return to their mother's care. Having thought very carefully about this issue, I have concluded that there is insufficient evidence for me to justify relying on those matters as establishing a risk to the children if they returned to the care of their mother. I do so for the following reasons. First, I can only take into account risks deriving from past facts proved on the balance of probability. Most of the issues relied upon in respect of a return to X have not been so proved. Second, though I can take account of the fact that there are areas of X which are dangerous, the mother's evidence was that she was likely to return to a city in the centre of a large safe area where she had a part-completed property and where she would be close to other family members. Her statements and those of the children about their fears of return were not proof of the existence of dangers, the magnitude of which would rule out either the return of the children to the care of their mother or indeed the entire family's return to X. The strong wish of all the family was to remain in the UK and I cannot disregard the influence that this desire may have had upon the stated fears of the mother and the children about the situation in X.

87. I begin by looking at what has changed since October 2017. Dr Van Rooyen now recommended a scaled-down rehabilitative plan of work based on what she considered to be a substantial reduction in the risk of physical harm posed by the mother to the children and on the positive changes made by the mother since October 2017. Her view was supported by events on the ground. Thus, D had not reported incidents of physical abuse by the mother since his return home though it was clear that he continued to test parental boundaries. I do not regard the mother's attempts to try and impose on D a timely return home at night as coming close to anything amounting to abusive behaviour. S had also

given no indication that he had been subject to physical abuse by the mother since his return home. By all accounts, S had settled well since returning to his mother's care and was very clear that he wished to remain with her in the UK. The contact between the girls and their mother which had taken place in the family home was of a better quality and considerably more relaxed than contact in the contact centre. I note that E was not enthusiastic about going into the family home when the first opportunity for contact at home unexpectedly arose when she was with the social worker. Nevertheless, with encouragement and support, she went and contact was a success. Contact in the family home has become the normal venue. I also note that the mother had consistently said she would not use methods of physical chastisement in respect of her children. These positive changes have taken place in circumstances of enormous stress for the mother. Whilst the Children's Guardian drew my attention to the mother's minimisation of matters agreed in the threshold document, I was not persuaded that this significantly altered the risk of physical chastisement to the extent contended for by the Children's Guardian. Those statements by the mother had to be placed in context and had to be evaluated in the light of the mother's current behaviour. As I have indicated, events in the family home indicated positive change despite great personal stress for the mother.

88. Mr Southey QC on behalf of D and S drew my attention to the mother's oral evidence that, if she and the children returned to X, the mother feared that the children might be physically chastised by others such as teachers in schools or other relatives/friends or even strangers if the children's behaviour was thought to be outwith what was expected of children in X. It was submitted

that those matters were relevant to my assessment of (a) the likely effect on the children of any change in their circumstances and (b) any harm the children might be at risk of suffering in their mother's care. These fears expressed by the mother were not raised in her lengthy recent interview with Dr Van Rooyen and they were also not matters raised in the final report of the Children's Guardian. I have already commented on the influence that the mother's strong desire to remain in the UK might have had on her evidence as to the risks of a return to X. What she said about the risks to the children which might arise in consequence of differing cultural attitudes in X towards the behaviour of children must be evaluated with this in mind and, without more, I am unable to conclude on the balance of probabilities either that the children would be treated by others as the mother apparently feared and or that they would suffer harm, namely significant harm, as provided for in s.1(3)(e) of the welfare checklist.

89. The risk to the children of emotional harm had two separate elements: (a) the mother's failure to validate the children's experiences; and (b) the mother's critical approach to the children. Of the two, the mother's failure to validate the children's experience of physical abuse was the more serious element. In that regard, it was my assessment that there had been a reduction in the risk of future emotional harm. First, though E and SL told Dr Van Rooyen that the mother had not apologised to them, the Children's Guardian's report stated that, recently and in the presence of E, SL had said that her mother had apologised for her past behaviour. In her oral evidence the mother gave a detailed account of the apology she had made to the children prior to August 2017 and, despite the fact that it was culturally difficult for her to do so, the

mother said in her oral evidence that she was willing to apologise to the children once more. The specialist parenting work proposed by the local authority would address the risk of emotional harm and it was likely that, all things being equal, the risk of such harm would be thereby reduced. I have taken into account the evidence of Dr Van Rooyen who noted that this issue was not insurmountable but that it did require the mother to think about the effect of what she had said and done. Though E remained determined to resist a return home, Dr Van Rooyen was of the opinion that this might change once she became more familiar with the family home and the mother was meaningfully able to validate her experiences. In that context Dr Van Rooyen was clear that E's willingness to have joint therapeutic sessions with her mother was a big step forward. Finally, the risk to the children from the mother's tendency to criticise them about matters such as hairstyle and weight, their performance of household chores and late nights or absences from the family home, was on the evidence before me a risk which appeared to be reducing and which, in any event, I find was not of such significance to amount to a ground in itself for the children's separation from their mother's care.

90. I turn to my assessment of the mother's parenting capacity. It was important to recognise that the mother engaged voluntarily with the local authority and that the children were accommodated via s.20 agreements prior to the commencement of proceedings and for several months thereafter. The mother engaged in a lengthy parenting assessment and also with parenting work offered by an independent charity. She was brutally honest in her evidence to me that her motivation to attend meetings which it was planned would achieve

further change in her parenting style had been significantly and adversely affected by her worsening personal circumstances. She accepted she had not engaged, to the extent desired, in the parenting work endorsed in my October 2017 judgment. I acknowledge the very significant strain on the mother occasioned by (a) her recall by the President of X in October 2017 (that date being the date the mother was informed of the same though it is different from the date upon which the recall notice was signed); (b) her abandonment both emotionally and financially by her husband, the father of the three younger children; (c) the financial stresses caused by a reduction in her wages in late 2017 arising from her recall; (d) the news of the termination of her diplomatic status set out in the February 2018 certificate from the FCO; and (e) the ongoing strain of the care proceedings. Additionally, I have taken into account the shift in the mother's attitude and the behavioural changes I have highlighted above. It was my overall assessment that, should the legal proceedings come to an end, the mother would be both willing and able to undertake work for the benefit of the children and that such work was more likely than not to have a positive outcome. That assessment accorded with the expert evidence of Dr Van Rooyen and with the assessment of the Children's Guardian, both of whom expressed a degree of optimism that the mother was capable of parenting the children safely. Though the professionals told me that, ideally, there should be a longer timescale for both parenting work and rehabilitation, I have concluded that, whatever work can be undertaken within this jurisdiction, the risk of future physical and emotional harm will be thereby reduced.

91. I have paid very careful attention to what the children said to me in letters or via their Children's Guardian's report. I have concluded that the children's wishes and feelings, however strongly expressed, cannot be determinative in the circumstances of this case. Those wishes and feelings fell to be assessed with an eye as to whether the children had a full understanding of what the immediate, medium and long term future might hold for them, having regard to the realistic options for their care. E's letter to me was expressed in stark terms and, if I were to give effect to the wishes set out therein, that would be to the exclusion of her mother for the remainder of her childhood and to the exclusion of her country and her culture. I must also bear in mind the evidence before me from E's foster carer that E had become accustomed to a different material lifestyle to the extent that it had influenced her views about returning to the care of her mother. Likewise, S's stated wish to remain in the UK irrespective of whether his mother could do so was at odds with his strong desire to live with his mother even if he were to be the subject of a final care order. Finally, SL's wish to return to the care of her mother was simply expressed in her letter though I was told in the Children's Guardian's report that her wishes in this regard had fluctuated.

92. The balancing exercise which I am required to undertake must consider the realistic options for the children in the light of the conclusions I have reached about the welfare checklist. There are two options, namely a return to their mother's care based on the mother's voluntary co-operation with the local authority's plan for rehabilitation over the course of a short number of weeks or full care orders being made with the children remaining in foster care for a longer period of time pending rehabilitation, the contingency plan being that

the three younger children would remain in the UK even if their mother had to return to X. The making of further interim care orders would not be a solution in this case in circumstances where the probability of the mother's return to X required me to make a final determination.

93. The making of final care orders on the basis outlined above would, in my view, have the likely and predictable effect of severing the family relationship if the mother were to return to X. Contact with the mother would be via telephone or Skype and the likelihood of the mother being able to have direct contact with the children was remote. Not only would the mother have to surmount the financial hurdle of paying for flights to and accommodation in the UK in order to exercise contact but she would also have to surmount a significant immigration hurdle in order to gain entry to the UK. The potential separation of the three younger children from their mother was described by Dr Van Rooyen as a major loss akin to a bereavement. When I asked Dr Van Rooyen where the balance lay between the children remaining in foster care and the children returning to the care of their mother even if she were unable to do all the work which was recommended, Dr Van Rooyen answered "*it's a fine balance – that's the difficulty*". Additionally, it appeared probable because of the difficulty in obtaining a placement for all three of the younger children together that the children would not be able to live together for the remainder of their childhood. Furthermore, maintenance of the children's cultural roots would be very difficult in these circumstances and the children would almost certainly lose any small chance of having a meaningful relationship with their father who, on the evidence before me, was an important figure for all of them. Finally, the children would remain in local authority care and be subject

to the known risks of such an outcome, for example, the breakdown of foster homes. I also observe that, if D had to leave the UK with his mother, the children's relationship with him would be subject to similar stresses as that with their mother.

94. Balanced against that option was a relatively speedy rehabilitation to the care of their mother on the basis she would undertake some parenting work and there would also be some therapeutic work with her and the children. That rehabilitation would occur by the time the mother was required to return to X even if all the therapeutic work envisaged had not been completed. This option was also not risk-free given the identified need for the mother and the children to have therapeutic support with a view to rehabilitation over a desirably longer period of time. Finally, the risk of physical and emotional harm to the children might not be eliminated in those circumstances.

95. Standing back, I have concluded that placement with the mother has not been established to be so contrary to the children's welfare that long-term placement in local authority care is necessary. Neither of the realistic options available to me were free from risk but it is not the court's function to opt for outcomes for children which are guaranteed to be free from either uncertainty or future risk. I cannot allow short-term difficulties to dictate the outcome for these children in the medium to long-term unless I am satisfied that those difficulties are truly insurmountable and inconsistent with the paramountcy of the children's welfare. In this finely balanced case, I am not so satisfied. There has been positive change in the risks presented by the mother as I have outlined and there are resources immediately available to work with her and

the children on a return home. Whilst there is still work to be done, short-term uncertainty about the timescale necessary to complete the work of rehabilitation cannot dictate the outcome for the remainder of the children's minority. My overall analysis of the positive and negatives of the two options for the children has led me to conclude that, notwithstanding what might be a truncated period of time for therapeutic intervention, the children should return to the care of their mother following a period of rehabilitation managed by the local authority.

96. Although the Children's Guardian's recommendation was based on welfare considerations, with any impact of the children's immigration status being consequential, the making of a final care order in relation to S on the basis that, should the mother be required to return to X, he would return to long-term foster care for the remainder of his childhood was a wholly disproportionate outcome. It was founded on an evidential basis about the risks in X which was not established to the relevant standard of proof and it represented, on one view, the making of an order which had the impermissible effect of depriving the Secretary of State for the Home Department of her power to remove S from the UK. As contended for by the Children's Guardian, final care orders with a contingency plan for long-term foster care which precluded the return of all three children to X were also, in my view, impermissible for the same reasons.

97. Though I understand the concerns expressed by the Children's Guardian in this difficult and finely balanced case, I have concluded that she sought to protect the children from both their mother and their homeland and, in so

doing, lost sight of the children's welfare in the short, medium and long-term. Her evidence focused on the negatives in the relationship between the mother and children rather than attempting to balance these against the positive changes achieved by the mother during the entirety of the legal process. In coming to this conclusion, I do not accept all of the criticisms made of the Children's Guardian by Miss McKenna though I was persuaded by her overall submission that I should be circumspect about accepting the recommendations made by the Children's Guardian.

98. The mother cooperated with the local authority pursuant to s.20 of the Children Act prior to the start of the proceedings and I am told will do so if my decision is for the children to return to her care. In all the circumstances, I have decided that making no order would be better for the children than making any form of public law order.

CONCLUSION

99. It follows from my decision that the local authority will need to undertake an intense period of work with both mother and the children so that they may return to her care as soon as possible. That will be a matter for the local authority to manage in consultation with the mother.
100. It would, in my view, be highly desirable for the rehabilitative work envisaged in the local authority's final care plan to be completed prior to any return by the mother and the children to X. The parties may wish to seek from the Secretary of State for the Home Department an extension of the time permitted to the mother and children to remain in this jurisdiction in order that this work might be completed. It is not a matter which is within the gift of this court.

101. That is my decision.