



Neutral Citation Number: [2023] EWHC 2412 (Fam)

Case No: FD23P00062

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2023

Before:

SARAH CROWTHER KC

Between:

OZ
- and -
ML
-and-
MK
AK
XK
YK

Applicant

1st Respondent

2nd – 5th
Respondents

(through their children’s guardian)

Mr Stephen Lue (instructed by **Ben Hoare Bell**) for the **Applicant**
Ms Cliona Papazian (instructed by **LDJ Solicitors**) for the **1st Respondent**
Ms Eva Holland (**CAFCASS Legal**) for the **2nd – 5th Respondents**

Hearing dates: 26th and 28th September and 2nd October 2023

Approved Judgment

This judgment was handed down remotely at 2pm on 2nd October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SARAH CROWTHER KC

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

Sarah Crowther KC:

INTRODUCTION

1. This is an application under the Child Abduction and Custody Act 1985 for a summary return order under the 1980 Hague Convention (“the Convention”). The purpose of the Convention is to ensure that the courts of the country which is the habitual residence of a child determine all disputed questions of welfare. Accordingly, where a child has been removed from or retained outside his country of habitual residence, the Convention provides for summary return so that long term decisions about his care can be heard and determined before the courts of that country.
2. The application concerns the Children (as set out below) who were all born in Kazakhstan and are of Kazakh nationality. The Children have been joined into the proceedings and have a guardian, who was present throughout the hearing and gave evidence. The guardian is represented by his solicitor, Ms Eva Holland.

Child	Girl or Boy	Date of Birth	Age
M	Girl	May 2012	11
A	Boy	6 October 2014	8 (nearly 9)
X	Girl	18 October 2016	6 (nearly 7)
Y	Girl	2 January 2019	4

3. The applicant father, OZ, is a Kazakh national. He is represented by Mr Stephen Lue of Counsel. He seeks the summary return of the children to the jurisdiction of Kazakhstan. He attended the hearing by video link with an interpreter who was also on the video link.
4. There is no issue between the parties that the father was exercising rights of custody at all relevant times. It is also common ground that the sibling group should not be separated.
5. The respondent mother, ML, is also a Kazakh national who is represented by Cliona Papazian of Counsel and attended the hearing in person. She also had the benefit of an interpreter who was present in court throughout the hearing although she made minimal use of his services, and her English is excellent. She resists the application on the basis that this Court has no jurisdiction to make any order under the 1980 Hague Convention because the Children were habitually resident in England and Wales at the date of the alleged wrongful retention. In the alternative, she argues that returning the Children to Kazakhstan would expose them to a grave risk of physical or psychological harm or would otherwise place them in an intolerable situation for the purposes of Art 13(b) and that M and A object to a return. It was confirmed at the outset of the hearing that the issue of consent as an exception to a summary return order was no longer being pursued by the mother.
6. These proceedings cannot, in any sensible way, properly be described as having been ‘summary’. The application was issued on 7 February 2023 and has taken nearly 9 months to resolve. There have been hearings on 9 February, 14 March, 21 April and 21 July 2023 as well as other orders on the papers. The hearing before me has taken place over 2 days. The bundle (which came as a main bundle of 722 pages and a 98-page

‘supplemental’ bundle of Kazakh proceeding materials) contained extensive statements and exhibits from both ML and OZ as well as jointly instructed evidence of Kazakh law. I heard oral evidence of ML and OZ in respect of residence, objections, and harm. I have received written submissions from OZ (two documents), ML and the Guardian as well as full oral submissions.

7. Over the course of the hearing and submissions, the following issues emerged for determination:
 - a) Was there a ‘retention’ by ML and what was the date of that retention?
 - b) Were the Children habitually resident in Kazakhstan at the time of the alleged retention?
 - c) If so: -
 - i) did M and A object to a return; or
 - ii) would the return of the Children to Kazakhstan expose them to a grave risk of physical or psychological harm or would it otherwise place them in an intolerable situation?
 - d) If either or both exceptions to a summary return under the Convention apply, should the court exercise its discretion to make a return order in any event?

THE FACTUAL BACKGROUND AND EVIDENCE

8. ML and OZ met through Facebook and were friends for some time on social media. They met ‘in real life’ in 2010 and then were married on 22 May 2011. The children were born in Kazakhstan and ML has always been their primary carer. M and A attended an international school in Kazakhstan and spoke English as well as Russian (the family’s first language) and Kazakh. X and Y speak Russian and English.
9. ML and OZ describe very different circumstances of the marriage. ML maintains that she was subject to controlling behaviours by OZ and his family and that she was treated effectively as an unpaid housekeeper by OZ and other members of the paternal family including whilst heavily pregnant. She describes a situation where her freedom was significantly curtailed, and she required permission from OZ for many aspects of day-to-day social and family life. OZ disputes this account.
10. In September 2020 ML received an offer from a UK university to study for a PhD and an associated scholarship from the Kazakh state agency. ML obtained a UK visa the terms of which required her to remain in the UK pending the duration of her studies and which permitted only short time-limited absences.

The October 2020 agreement

11. OZ contends that he was worried about this because ML did not tell him she was making applications for PhD courses. He viewed her actions as raising an issue of trust. He states that ‘in order to reassure him’ about various concerns he had regarding the children coming to the UK, (including in his words the risk of dying in a car accident

or joining a dangerous sect), ML and OZ signed on 25 October 2020 a ‘temporary relocation agreement’. OZ’s case is that this agreement was ‘conditional approval’ by him on the basis that ML gave him her ‘unconditional consent’ to return the children as soon as he ever asked her to.

12. ML’s evidence is that none of these discussions took place and that there was no written agreement in October 2020. For my own part, I have considerable doubts that this agreement was signed in October 2020, not least because its terms are strikingly prescient: they appear to predict with surprising precision and foresight the exact issues which in due course would cause OZ concern, for example that after school clubs would cause friction regarding the timing of contact videocalls.
13. At any rate, whether the document was signed in October 2020 or August 2022 as ML says, the terms are stringent in respect of ML’s personal freedom, and it is designed to be protective of OZ’s assertion of his rights over the Children and ML. It requires ML to provide an exhaustive list of phone numbers, instant messaging accounts, e-mail addresses, mobile phones, and laptops, as well as the login and passwords to the above devices and accounts and to provide details to OZ of any changes within 24 hours of them being made. ML promises that her studies will ‘not be an excuse for refusing to fulfil the obligations as a wife and mother.’ Another material term provides that the Children will live in the UK, but only for as long as ML ‘has financial means’ to do so. ML promises to ‘ensure’ that the Children communicate with OZ ‘every day for at least 1 hour’ and that she personally will respond to all calls and messages within 3 hours.
14. Notwithstanding all these features which, in my judgement, bear the hallmarks of financial and coercive control by OZ of ML which is consistent with all the wider evidence in this case, the basic premise of the October 2020 agreement is that OZ gives his consent for ML and the Children to live in the UK for the duration of the PhD studies, which is anticipated to be July 2024. OZ supported the move in principle.
15. The parties travelled together to the UK in November 2020 on a one-way ticket and OZ stayed with ML and the children until January 2021. ML describes how she brought mostly clothes and books and intended to buy household items on arrival. The Children were registered with a GP and dentist locally in December 2020 and an optician in July 2021. It is common ground that OZ helped organise the move and find school places for the children and paid for the rental of a 5/6 bed roomed house for the first 12 months assured shorthold tenancy. The Children attended remote schooling from November 2020 at a local primary school, and from March 2021, they attended in person.
16. From the perspective of the Children, the evidence shows that at the time of the move to England in November 2020, they knew that they were coming to England to live with their mother, on whom they were dependent as their primary carer and that they could expect to be in England for a long time. M (who was 8 years old at that time) told the Guardian that she knew she was coming to England for an extended period while her mother was studying.
17. OZ visited the UK again in April and July 2021. In August 2021, OZ had COVID-19 and was hospitalised. As it became clear that OZ was on the path to recovery, ML wanted to take the Children on a summer holiday to Turkey, but OZ instead insisted that ML and the Children should go to Edinburgh for a short break. ML was cross-examined on the basis that it was callous and heartless of her to seek to arrange a foreign

holiday and showed a lack of sympathy for OZ's health and wellbeing. Mr Lue was clearly acting on instructions in this regard. This is an example of how OZ puts concerns about himself ahead of the Children and that his expectations of ML are to prioritise his wishes and feeling above those of the Children. I have no doubt that he does not see things that way.

18. ML and the Children visited Kazakhstan for New Year 2022. ML states that she only did so because OZ shouted at and harassed her. By this point she had decided that she considered the marriage to be over. She had also sent her biometric registration document to the DVLA to obtain a UK driving licence. OZ disputes the allegations of harassment and shouting. ML recounts that she was unable to return to the UK in January 2022 because she did not have her biometric registration document. This delayed her return until 21 January 2022.
19. OZ visited the UK in February 2022. ML describes a situation in which OZ was 'trying to force me to make amends with him' and that he broke the lock on the shower door when she was taking a shower and 'forced himself on her'. She alleges that he installed secret surveillance devices in a smoke alarm and alarm clock. She also states that he installed remote tracking software on her laptop and that she interrupted him in the middle of the night taking the back off her mobile phone seeking to install a tracking device. OZ denies all these allegations.
20. OZ's case is that at this point he changed his mind about the Children living in England with their mother, 'I decided that it is time for the children to stop living in the UK, period, especially after the Russian invasion of Ukraine on 24 February 2022.' He further states that ML then agreed that she and the Children would move back to Kazakhstan, but that she raised various reasons 'for delay'.

March 2022

21. On 9 March 2022, ML contends that OZ attempted to abduct the Children to Kazakhstan. She states that OZ insisted on taking all the children to school, even though Y had a fever and was not well. School contacted ML, indicating that the Children were absent. ML called OZ, who told her that he had taken them shopping and to the park. However, she received an email at 5pm from OZ stating that in fact he had taken them to Kazakhstan and that she must follow within a week.
22. OZ's evidence is that he went to the Kazakh embassy in London and obtained travel documents for the Children. He was arrested at the airport, because ML had reported to police that she did not consent to the removal of the Children. OZ contends that this was a false statement by ML. I have seen the police report into this incident and ML's account is broadly consistent with her account in these proceedings.
23. M recalled what had happened in March 2022, and said that OZ had put the Children in a taxi, but instead of taking them to school had said that they were going to Kazakhstan. A also told the guardian, 'Dad lied to mum when he took us to the airport.'
24. Following this incident, OZ failed to renew the tenancy on the property in which ML and the Children were living. ML's evidence to me was that OZ did not permit her to have her own bank account and did not provide funds for any place for them to live. Since that time, therefore, ML and the Children moved out of that house and have been

living in university accommodation. ML reports that this has been an extremely difficult time for her and the Children because they were financially dependent upon OZ. Whilst at that stage she retained the benefit of the scholarship grant for her studies, it was modest. Moreover, she told me in evidence that OZ left her in the UK with many outstanding debts running to several thousand pounds which she was unable to meet.

25. Thereafter, OZ says that ML's own father (the maternal grandfather of the Children) demanded money in exchange for ML's retraction of her statement to UK police and that ML would make (false) allegations of domestic violence against him and persuade the Children to support them. The grandfather also allegedly threatened to inform OZ's mother of the allegations and 'to organise a press-conference'. OZ says that he paid some money to ML, and she withdrew her allegations the next day.
26. On 1 April 2022, OZ reported ML's father to Kazakh police for blackmail. He says that the police advised him to open a case against ML for repayment of the monies. Subsequently ML's father was arrested by police in Kazakhstan on suspicion of blackmail based on OZ's allegations. OZ accuses ML of being party to the alleged blackmail plot.
27. ML gives a different account of this incident, stating that OZ 'set up' her father who was trying to support her and the Children by getting some financial means for them as OZ had left her in England with substantial debts and no way of providing for the Children other than her scholarship stipend. She accepts that £5,000 was paid by OZ to her in April 2022. She contends that her father was remanded in custody by Kazakh police and that as a result she was forced to return with the Children to Kazakhstan. Her case is that it was intended to be for a week and the flight tickets were return ones. She notified the Children's school of one week's absence.

May 2022

28. ML returned to Kazakhstan with the Children on 14 May 2022. OZ told me that ML was expecting to be arrested, however he had closed all the cases against her and her family, 'as I was hoping to restore family and give my children the chance to have happy mother and father.'
29. M (the eldest child, then aged 10), told the guardian that her expectation and that of her siblings was that there would be a short holiday in Kazakhstan. There was no question of a permanent return.
30. ML's account is that on arrival in Kazakhstan she made a brief visit to her brother to see her baby nephew, during which time OZ destroyed the children's travel documents and removed hers. Upon her return, he forced her to sign a second written agreement (a document which she was made to sign once more in August 2022 and which in the bundle is dated August 2022).
31. She states that she was forced to email the UK police on 16 May 2022 retracting her allegations against OZ. She accepted in oral evidence that this was a false statement. There is in the bundle an email response from the police officer which notes that the language and tone of the email suggested to her that ML was not the author. There is also email correspondence with the school in the UK in which ML explains she will

need to extend the period of absence due to the need to obtain replacement travel documents. ML wrote to UK police on 16 May 2023 withdrawing her allegations.

32. OZ describes ML as ‘an ideal wife’ during ‘a wonderful 3-4 months’ during the period of summer 2022. He says that they went to Montenegro in August 2022, ‘to restore our relations.’ Notwithstanding these comments, he adds that he was ‘afraid that she might commit a crime against me’ and therefore ML ‘said [she] would give an additional written guarantee that nothing bad would happen to me.’ His evidence is that ML volunteered that he should therefore ‘monitor her laptop and phone’ and that she would consent to the installation of ‘remote control applications on her devices so I could track her’. He states that he did not install them, ‘because he wanted to show her trust’ and that they agreed that ‘if anything did go wrong, she would return the children at once.’
33. ML returned to the UK alone and contends that she was under considerable pressure to abandon her studies. She states that OZ was using Google maps to track her movements and her emails were all being accessed by him. She could not go out or meet friends.
34. A’s account to the guardian was that he missed his mother and felt sad and that he did not enjoy being looked after by the nanny, because ‘she didn’t let us do anything (games and activities).
35. The Children went to school in Kazakhstan for about 2 months at the international school. M told the guardian of her unhappiness at being separated from her mother, missing her mother and how the care of the siblings was delegated and passed between teenage cousins or a nanny. The guardian related in his oral evidence to me that M had explained the feeling of uncertainty, not knowing how long she would be staying in Kazakhstan and her consequent sense of deep instability, that she was only kept going by her mother calling and reading them stories over the video link at night. M had to miss a planned birthday party with her friends in the UK and asked her mother when she could have a party and see her friends again. She had little to say to the guardian of how school was in Kazakhstan.
36. ML recounted in oral evidence that during this period the Children would ask her to show them familiar places using her camera on the video calls. Y would ask after her baby doll and its pushchair which she had left behind. The Children constantly asked when they were coming home.
37. ML told me in oral evidence that she had attended a notary’s office with OZ and signed a power of attorney which was subsequently used by OZ to transfer interest in a property from ML to one of OZ’s brothers.
38. ML accepted that she had signed the agreement dated 16 August 2022 at the family apartment in Kazakhstan. She told me that this was the second time she had been invited to sign the agreement. The agreement terms are mostly a recital of various allegations which OZ makes against ML and which she ‘fully acknowledges her fault’ in respect of. It additionally obliges ML to send any income she earns in the UK to OZ. She agreed with Mr Lue in cross-examination that there was no threat of physical violence.
39. The final term of the agreement is a prorogation clause in favour of the courts of Nur-Sultan. It states,

“Only the current legislation of the Republic of Kazakhstan applies to agreement between [OZ and ML]. All disputes, disagreements or claims between [OZ and ML] during the period of residence in the UK, including those relating to the violation of the concluded agreements, are subject to final settlement in the court of Nur-Sultan.”

40. It has not been suggested to me on behalf of OZ that this term has any impact on the power of this court to hear and determine the Convention issues and I cannot see any basis on which it might.
41. ML’s evidence in respect of all these documents is that she was desperate to get the Children back to the UK and therefore was in a position where she felt she had little choice but to sign everything which OZ requested.

September 2022

42. ML returned to the UK with the Children on 18 September 2022. M told the guardian that returning to England in September 2022 was like coming back home and she was much happier.
43. OZ complains that ML did not follow the terms of the agreements and that the children were not made available for video calls with OZ every single day, but rather every 3-5 days. He says that, in October 2022, ML agreed that the Children would come to Kazakhstan in July 2023. In the meantime, OZ was to visit the UK for New Year. OZ says ML changed her mind and in response he stated there was a ‘clear violation of the agreement and the children should be returned to Kazakhstan at once.’ He bought tickets and arrived in the UK on 27 December 2022 whereupon he was arrested at the airport on the back of allegations by ML regarding coercive control.

Divorce proceedings

44. ML instituted proceedings for divorce in early 2023. OZ is disputing the divorce proceedings. In his evidence, he told me that if I ordered a return of the Children, he would accede to ML’s divorce request at the next hearing which he tells me is listed for October 2023. The parties are in dispute as to when ML first asked for divorce. However, that is not material to the issues I have to determine.

Police and Asylum Application Disclosure

45. The Court invited the Secretary of State for the Home Department to intervene in proceedings given ML had submitted a protection claim. OZ notified the Home Office and parties that he sought disclosure of the documents in the protection claim. The claim was unsuccessful, and the decision is not subject of any appeal. The documents were provided to OZ on 30 June 2023. They were included in the bundles, and I have taken them into account, although they have provided only limited assistance to me.
46. There was a further hearing on 21 July 2023 at which directions were given for limited disclosure of the police files. There are police notes of the interview with ML conducted on 26 December 2022. No checks were carried out by police which would reveal whether there was surveillance software or other equipment installed on ML’s devices.

I have read the police disclosure, and, in my judgement, it is materially consistent with ML's case.

Guardian's evidence and case analysis

47. Nick Lill, of the CAFCASS High Court Team, prepared a report dated 21 September 2023. He saw the Children on a videocall on 8 June 2023 and then had home visits with the Children alone on 26 June and 14 September 2023.
48. He reported that he had contacted the Children's school designated safeguarding lead who indicated that all the Children had good presentation and attendance. M is described as diligent and hardworking and has good relationships with peers and is a popular member of the class. A is intelligent and excels in maths, he works hard and is well-liked by peers. He participates in chess club at school and competitions at weekends. He is a lovely boy who is very happy and settled at school. X is also happy with a good group of friends. All the Children are described as being age-appropriate in terms of maturity and ML is reported to communicate well with the school and to be supportive of the Children's education.
49. He described the Children to me as being very respectful and polite. M is earnest and composed and expressed herself well in English. M was concerned about speaking to the guardian in case it made OZ angry about her views. I was particularly struck by the guardian's oral evidence when he expressed how difficult M had found it to express any criticism of OZ and how muted her language was. He concluded that she has a high degree of emotional intelligence and considers the implications of her decisions, notably in relation to her father which is evidence of maturity in his view which makes it appropriate to take account of her views.
50. She told the guardian that she is upset when her father tells her what to say to the court and her mother, specifically, "that we want to go back to Kazakhstan". He became angry when she told him she wanted to stay in England which frightened her. He said, "if you don't need me, I can find another wife and children." She says this made her feel bad. He constantly asked whether she had spoken to the guardian, and this made her uncomfortable.
51. The guardian notes that M has consistently expressed that she does not want to return to Kazakhstan. She says she does miss her dad and her home in Kazakhstan, but she still wants to live here. M believes her mother when she says that she will not return to Kazakhstan, even if they are returned there, but notes that it not just about her mum, but also her friends and teachers and thinks that mum would visit her in Kazakhstan. M stated that she was worried that the decision would be for her to return to Kazakhstan.
52. In respect of A, the guardian contrasted his attitude to his father, of whose anger he was fearful, with that shown towards his mother. A made a joke of the fact that ML would sometimes shout upstairs for the Children to make less noise if it was disturbing her work. A described his contact time with OZ and stated that it was spent playing games and watching cartoons via videocall. In his oral evidence, he expanded on this point, stating that there was no evidence that OZ ever showed any interest in the Children's emotional wellbeing or the other aspects of their lives. He felt that OZ placed considerable value on the quantity of contact time at the price of the quality of the contact.

53. A also had been told by his father to say that he wants to live in Kazakhstan. A said, ‘I do not like it, I want to stay here.’ He also found it difficult to talk to the guardian because of his fear of OZ’s anger. A did not miss Kazakhstan because he had made new friends at school and had forgotten his old ones. A ‘was clear that he does not want to return to Kazakhstan, regardless of when mum finishes university.’ He said he would be ‘very sad’ if he were made to return. When asked about whether his mother might visit him, he reminded the guardian that OZ had previously destroyed the Children’s passports and therefore felt there was a risk that this might happen to his mum if she came to visit.
54. X would like to stay in England because she loves England and has lots of friends. She does not speak Kazakh but does speak Russian. She would like her parents to live in the same house together and describes her father as being angry during videocalls.
55. Y told the guardian she loves her daddy and all the family. Given her age, she mostly engaged through play.
56. The guardian notes that M, A and X presented their own views in their own language and had no sense of rehearsal or scripting and had appropriate emotional responses. He notes that the views are aligned with mother but considered that they had not been influenced by her. He noted the reluctance to criticise their father and considers it positive that they have managed to express their feelings despite the influence he has tried to assert over them.
57. The guardian referred me to the psychological assessment of the family members which took place in the Kazakh proceedings and invited me to have regard to the findings of that report, which (although the Court did not follow it) recommended that the views of M should be considered. Apart from the fact that in broad terms the views expressed by the Children appear to be the same as the ones they expressed to the guardian, it is difficult to draw many conclusions from this report. It is a translated document and has been produced subject to instructions which I have not seen and in the circumstances of the very different procedural context and questions which the Astana juvenile court was asking itself. I do take note, however, of the factual observation of the psychologist when she notes that following the interviews, OZ collected the Children and was not in any way interested in their emotional response or their wellbeing, but solely whether they had said the things he wanted them to say.
58. OZ disagreed with the guardian’s conclusions, submitting that M did not have sufficient maturity and that both A and M did not have sufficient recall of less recent events for their views to be worthy of consideration. He also, through counsel, raised a written list of factual corrections, many of which were not material, and the others were repeating points which he made elsewhere in his evidence regarding the disputed matters which I have set out above. I am satisfied that none of these points affect the validity or general accuracy of the guardian’s factual basis upon which his opinion was formed.

Kazakh Law

59. An expert in Kazakh law, Dimitry Valeryevich Chumakov, of Sayat Zholshy & Partners was jointly instructed and prepared two reports both dated 1 September (the second of which appears to be an amended version of the original report to include ‘addendum’ questions but not re-dated). Mr Chumakov was not called to give any oral evidence and

his opinion was not challenged in submissions. I note that Mr Chumakov was the expert witness in the case of *AB v CD (Abduction: Undertakings) [2021] EWHC 665* and gave substantially similar evidence before Peel J in that case.

60. I make the following findings of fact in relation to the material Kazakh law: -
- a) In Kazakhstan the specialised interdistrict court for juvenile affairs has the jurisdiction to hear and determine disputes concerning a child's place of residence, contact arrangements and child relocation by a parent outside Kazakhstan for permanent residence in a foreign state.
 - b) Allegations of domestic abuse fall in the jurisdiction of the specialised interdistrict courts for administrative or criminal matters and not the juvenile affairs court.
 - c) Undertakings and orders granted in the High Court of England and Wales are not enforceable in Kazakhstan due to the absence of an international treaty on mutual assistance in civil and family matters between Kazakhstan and the United Kingdom.
 - d) A parent can bring an action before the juvenile affairs court even where a previous order has been made in the event of a material change in the factual circumstances including those of the children's upbringing. An allegation of domestic abuse can amount to a change in factual circumstances.
 - e) When considering an application by a parent to relocate a child outside Kazakhstan permanently, there is a checklist of factors which the Kazakh court must consider, including:
 - i) The child's attachment to each parent and siblings
 - ii) The child's age.
 - iii) The parent's moral and other qualities
 - iv) The child-parent relationship
 - v) The capacity of each parent to create an appropriate environment for the child's development and upbringing (including their occupation, work pattern, financial position, marital status, and any other factor concerning the environment of each parent's place of residence.
 - f) However, the advantage of one parent over the other in terms of financial status and standard of living does not constitute good and sufficient reason to satisfy that parent's claims.
 - g) The decision of this Court may be taken into account by the Kazakh court in making its decisions, but it is but one factor amongst all the material circumstances and is not determinative.

61. I further find that in Kazakhstan family law, out of court agreements in relation to child arrangements are permitted and encouraged. Alternative dispute resolution means including mediation can be adopted. Any agreement is taken to be in terms which accord with Kazakh general family law and cannot include any terms which conflict or contradict the general law. Such an agreement can include undertakings in respect of refraining from harassment by one parent of the other.
62. Enforcement of the terms of any such agreement is by institution of separate proceedings. Penalties for breach of the agreement can be anticipated in the agreement and include monetary penalties, but there is no equivalent to injunctive relief to protect a parent from harassment.
63. Where allegations of domestic abuse are raised, a complaint may be raised with the public authorities. It is for police to investigate and then to determine whether to institute proceedings. A victim cannot file an allegation directly with a court for determination.
64. Domestic violence is defined by the Law on the Prevention of Domestic Violence as 'wilful misconduct/action/omission in family and domestic relations inflicting or threatening to inflict physical and or mental suffering on other persons' However, the code of administrative and criminal offences does not recognise terms such as 'coercive or controlling behaviour', 'financial control', 'control over communications' or 'surveillance of electronic devices.' The Code includes offences in respect of 'beatings', 'wilful infliction of harm to health', 'torture' and 'insults'. Children can be defined as victims of domestic abuse.
65. The police and criminal courts have powers to prevent domestic abuse which include (i) counselling by a police officer (ii) prohibitive orders restraining contact with the victim and family members with an administrative penalty such as a caution, fine or arrest in the event of breach. Where criminal proceedings are instituted, further orders can be made with a sanction of administrative arrest for a period of up to 5 days or provision of a caution.
66. Injunctions are time-limited up to a maximum of 30 days from the date of service.
67. Kazakhstan is not party to the 1996 Hague Protection Convention and therefore undertakings given to this court are not enforceable in Kazakhstan.

Proceedings in Kazakhstan

68. ML made a claim for alimony before the District Court of Astana, but it is recorded that the claim was dismissed following withdrawal by ML.
69. On 13 March 2023 the specialised interdistrict court for juvenile affairs in Astana considered a case in which OZ applied for determination of the 'place of residence' and for a return order for the Children.
70. It was held by that Court that ML and OZ had agreed that all disputes and disagreements 'between the parties' would be subject to the exclusive jurisdiction of the courts of Astana.

71. By its reasons in respect of the determination of residence and relocation order, the Court relied on paragraph 3 of the Agreement dated 25 October 2020. It recorded that the agreement was signed by ML and OZ and had not been declared invalid. It relied on the fact that ML had applied for refugee status in the UK and that the grant of asylum would prevent the Children from returning to Kazakhstan on the basis that they were fleeing that State. In the Court's reasoning, such an outcome would be contrary to the Children's best interests because it would preclude their return. On this basis, the Court refused to attach any weight to the views of M (the eldest child) because it concluded that she was of insufficient maturity to appreciate the long-term consequences of refugee status and its impact on her ability to return to Kazakhstan or loss of cultural heritage.
72. In a further decision dated 26 June 2023, the Astana juvenile court held that the agreements were not in contradiction to the Kazakh domestic law. ML's appeal was dismissed on 5 September 2023.
73. I have not been asked in this case by OZ to consider that there is any issue estoppel arising between OZ and ML because of the above determination. Proceedings in a jurisdiction other than England and Wales can potentially give rise to an estoppel where a final, conclusive decision on the merits given by a court of competent jurisdiction determines the same issue between the same parties as falls to be considered in the later proceedings in England and Wales (see *Carl Zeiss Stiftung v Rayner [1967] 1 AC 853*).
74. OZ relies heavily on the written agreements with ML the terms of which require her to return the Children to Kazakhstan immediately at his discretion and without discussion. The validity of the agreements dated 16 August 2022 and 25 October 2020 has already been determined in the Kazakh proceedings. It can be seen from the reasons that OZ maintained a case for return of the Children to Kazakhstan based on the agreement dated 25 October 2020 and no consideration appears to have been given to whether the Children's residence in England was habitual at any point. Whether the agreements are valid and binding as between the parents as a matter of Kazakh law or not, there is no reasoned consideration of habitual residence in accordance with the Convention principles.
75. Nor has there been any consideration of the wider issues under the Convention of the extensive financial and other coercive control to which ML, says she had been subjected throughout the period of the marriage in relation to the harm/intolerable situation exception in Art 13. As the Kazakh law evidence makes plain, it is open to the court to reconsider its position in light of allegations of domestic violence.
76. Insofar as there is consideration of child objections, these proceed on the basis that there is an outstanding application for asylum by ML in the UK which would preclude any return by the Children to Kazakhstan, that application has now been refused and is not appealed.
77. For all these reasons, it is clear to me having read the reasons of the Astana Juvenile Court, that the issues in respect of the Convention which are now before me were not before the Astana court. Therefore, even if the question of issue estoppel been raised before me, I would have rejected that suggestion.

Arrest of ML's brother in Kazakhstan 26th September 2023

78. At the commencement of the second day of the hearing before me, Ms Papazian informed the Court that ML's brother had been notified by Kazakh police that he was to attend to be interviewed on 25th September (the day on which proceedings were originally listed) on suspicion of fraud charges laid by OZ. ML's brother was arrested on 26th September and was held in custody until 28th September, when he was released on police bail.
79. Ms Papazian invited me to receive translated evidence of a 25-page charge sheet over the weekend as I had indicated my intention to deliver a judgment on Monday 2nd October 2023. She wished to contend that this was evidence that OZ was manipulating the state authorities in Kazakhstan and seeking to place further pressure on ML in these proceedings by raising false allegations against her family members.
80. Mr Lue was in some difficulty in obtaining instructions because he was not attended by anyone from his instructing solicitors, and he first became aware of these allegations in open court. I gave an adjournment for him to ascertain what OZ had to say. Mr Lue told me on instructions that the original charge was made in May 2023 and arose out of what OZ said was an unpaid business investment loan/joint venture agreement of approximately £12,000. He denied that he had any involvement in the case being reinstated but noted that there had been a change of lead officer on the case which had led to the investigation being re-opened.
81. I have decided that this issue is peripheral in its relevance to the matters I must consider and that it would be both disproportionate in costs and unnecessary in terms of delay to what has already become a protracted dispute for these matters to fall within the scope of my consideration. As I indicated orally in the hearing, I cannot determine what the truth of the matter is regarding OZ's involvement in the bringing of the charges at this time and I decline to do so. The allegations have not formed any part of my decision in this case.

THE LAW

Habitual Residence

82. Habitual residence is not a matter which arises as an adversarial issue on which the court adjudicates between the parties' respective arguments: it goes to the heart of the court's jurisdiction to order the summary return of the Children: see *In Re X (A Child) [2022] EWCA Civ 1423 [2023] 4 WLR 46*, para 65.
83. The question of which country is the one of habitual residence of a child for the purposes of Art 3 of the Convention is one of fact and not law. That said, the nature of the factual analysis has been subject of much consideration by the appellate courts in recent times. In *A v A*, the Supreme Court adopted the test set out by the Court of Justice of the European Union in its decision in *Mercredi v Chaffe*. The country of habitual residence is the place which reflects some degree of integration by the child in a social and family environment. In that case the CJEU set out a non-exhaustive list of circumstances which might be relevant: -
- i) Duration, regularity, and conditions for the stay in the country in question.

- ii) Reasons for the parental move to and the stay in the country in question.
 - iii) The child's nationality.
 - iv) The place and conditions of attendance at school.
 - v) The child's linguistic knowledge.
 - vi) The family and social relationships the child has.
 - vii) Whether possessions were brought, whether there is a right of abode and whether there are durable ties with the country of residence or intended residence.
84. What is significant is not the permanence of the residence, but its stability (*Re R (Children)* [2015] UKSC 35; [2016] AC 76. There is, therefore, no requirement that a child be resident in the country for any particular period, let alone any intention on the part of one or both parents to reside in that country indefinitely or permanently (para 16).
85. It also follows from that test that integration does not have to be full or complete – what is required is a ‘degree’ of integration (see *Re B (A Child) (Reunite: International Child Abduction Centre Intervening)* [2016] UKSC 4; [2016] AC 606 at para 39).
86. Baroness Hale in *A v A* explained that there is no legal rule akin to domicile and therefore a child does not automatically take the habitual residence of her parents. The test is focussed on the situation of the child and the purposes and intentions of the parents are merely one of the relevant factors to take into account. In the case of a young child or infant, the social and family environment is shared with those upon whom she is dependent, so it is necessary to consider the integration of those persons into the social and family environment of the country concerned.
87. The role of parental intent was discussed by the Supreme Court in *Re L (A Child) (Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75; [2014] AC 1017 (at paragraphs 18 onwards). Parental intention does play a part in establishing or changing the habitual residence of the child, but not as a legal concept, rather because it is relevant to the reasons for a child leaving one country and going to stay in another, which have to be factored in, together with all the other relevant factors, in deciding whether a move from one country to another has a sufficient degree of stability to be a change of habitual residence.
88. In *Re LC (A Child) (Custody: Habitual Residence) (Reunite: International Child Abduction Centre Intervening)* [2014] UKSC 1; [2014] AC 1038 it was held by the Supreme Court that the relevant factors regarding the child's integration into a new environment encompass more than the surface features of her life, but also include her state of mind, bearing in mind that this is not the same as her wishes, views or intentions, but is the state of mind during the period of residence.
89. In *Re B*, Lord Wilson considered ‘expectations that a factfinder may well find to be unfulfilled in the case’, namely:

- a) The deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state.
- b) The greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and
- c) Were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it.'

90. More recently still, the Court of Appeal reminded factfinders that the statement of Baroness Hale in *A v A* is a 'shorthand summary of the approach' and that there is an open-ended, not closed list, of potentially relevant factors, because it is an issue of fact which requires consideration of all relevant factors *A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention) [2023] EWCA Civ 659 (para 42)*. Moylan LJ reminded factfinders how the CJEU had dealt with the issue at greater length in *Proceedings Brought by A (para 43)*,

"[37] The "habitual residence" of a child, within the meaning of article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case.

[38] In addition to the physical presence of the child in a member state, other factors must be chosen which are capable of showing Judgment Approved by the court for handing down. A (A Child) that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.

[39] In particular, the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration.

[40] As the Advocate General pointed out in para 44 of her opinion, the parents' intention to settle permanently with the child in another member state, manifested by certain tangible steps such as the purchase or lease of a residence in the host member state, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that state.

[41] By contrast, the fact that the children are staying in a member state where, for a short period, they carry on a

peripatetic life, is liable to constitute an indicator that they do not habitually reside in that state.

[42] In the light of the criteria laid down in paras 38-41 of this judgment and according to an overall assessment, it is for the national court to establish the place of the children's habitual residence.”

91. As Moylan LJ made clear, a test of ‘some degree of integration’ in any one country cannot be sufficient, especially when a child might be said to have *some* degree of integration in more than one country. He referred to his previous judgment in *Re G-E (Children) (Hague Convention 1980: Repudiatory Retention and Habitual Residence) [2019] 2 FLR 17 at paragraph 59* in which he made plain that the exercise is of a ‘comparative nature’ and the court is required to consider the factors which connect the child to each State where they are alleged to be habitually resident.

Harm

92. ML alternatively relies on the harm exception set out in Article 13(b) of the Convention. The leading case in which this provision was considered by the Supreme Court is *Re E (Children) (Abduction: Custody Appeal) [2012] 1 AC 144*.
93. The words of Art 13(b) are to be given their natural and ordinary meaning which is of restricted application. The burden lies on the person opposing return and there must be evidence to support a finding on the balance of probabilities for the exception to be made out.
94. However, as this is a summary process for the consideration of jurisdiction, the evaluation of disputed evidence is not conducted as it would be following a full trial. Rather, the court will need to bear always in mind the limitations which arise from the fact that the process is summary, and that evidence has not been fully tested.
95. Therefore, the approach to be adopted is not one of fact-finding in respect of the veracity of the matters alleged as grounding the exception. Instead, the court assumes the risk of harm at its highest and, if that meets the level of seriousness, go on to consider whether protective measures sufficient to mitigate the harm can be identified. Assumptions made about the maximum level of risk must be reasoned and reasonable. They must be based on the relevant admissible evidence evaluated in accordance with the summary process approach set out above.
96. The level of seriousness which must be reached is one which can be characterised as ‘grave’. It is the risk which must be ‘grave’, rather than the ‘harm’ but there is a link in the language between these two concepts such that a relative low risk of death or really serious injury might properly be qualified as ‘grave’ while a higher level of risk might be required for other less serious forms of harm. ‘Intolerable’ is a strong word which means a situation which these Children should not be expected to tolerate in these particular circumstances. It also gives context to the words ‘physical or psychological harm’.

97. The situation which a child will face on return depends on the protective measures which can be put in place to ensure that the risk of harm is mitigated, and any situation of intolerability is avoided.
98. Where the potentially intolerable situation arises because the taking parent refuses to return with the child, it will depend on the facts of the case whether the exception is made out: *AT v SS* [2015] EWHC 2703 (Fam) *MacDonald J*. In deciding whether a situation on return would be intolerable, the source of the risk is a relevant consideration and a conscious refusal to return by the parent who alleges that creates the situation she relies on as intolerable is a matter to be taken into account when considering whether article 13(b) is met.
99. A court must be astute not to permit a party to frustrate deliberately the operation of the Convention, because otherwise any party with a young child could simply refuse to travel with the child and its entire operation would be undermined: *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654.
100. In cases where allegations of domestic abuse are raised, the court should ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, then the court must consider how can the child be protected against that risk.

Child's objections

101. In the case of *H v K (Return Order)* [2017] EWHC 1141, *MacDonald J* (at paragraphs 46 and 47) summarised the relevant legal principles to be derived from *Re M (Children) (Abduction: Child's Objections)* [2015] EWCA Civ 26, [2015]. 3 WLR 803, as endorsed by the Court of Appeal in *Re F (Child's Objections)* [2015] EWCA Civ 1022. In that case, he said,

“(i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.

iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.

iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.

v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare as well as the general Convention considerations (Re M [2007] 1 AC 619)."

102. Additionally, I remind myself that the objection must be to being returned to the country of his habitual residence and not to living with a particular parent. Any objection to returning to a particular parent may be inextricably linked to return to a particular country in which case, both factors must be considered. This can arise where, for example, the only place where the child would be able to live on returning to the foreign country would be with that parent.

Discretion under the Convention

103. In *Re M (Zimbabwe)*, Baroness Hale considered the law in relation to the exercise of the discretion. She said,

“[43] My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para [32] above, save for the word 'overriding' if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.

[44] That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will

vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.”

104. In re G(Children) (CA) [2021] Fam Peter Jackson LJ observed,

“[41] To sum up, the exercise of the discretion under the Convention is acutely case-specific within a framework of policy and welfare considerations.

In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child’s welfare.”

DISCUSSION

Date of Retention

105. Ms Holland, appearing on behalf of the Guardian, directed me to contemporaneous messages which cast some doubt on whether in fact ML and OZ had agreed that ML would bring the Children to Kazakhstan. Ms Papazian for ML reminded me that OZ’s case on the date of retention has evolved throughout the duration of the proceedings. Mr Lue opened his case on the basis that the date of retention might have been November 2022, however, in closing he indicated that OZ was relying on what he said was an agreement between ML and OZ to return to Kazakhstan with the Children on 30 December 2022.
106. On the totality of the evidence, I am satisfied that in September 2022, OZ did consent to ML removing the Children from the jurisdiction of Kazakhstan for the purpose of them living in the UK for the duration of ML’s PhD studies, which are anticipated to take until summer of 2024. At that time, the evidence shows that the plan had initially been that OZ would visit the UK in December 2022 for the Christmas period.
107. The evidence in the video call transcripts and WhatsApp messages demonstrates that on or about 18 December 2022, OZ changed his mind and decided that he wished for ML and the Children to travel to Kazakhstan. In that WhatsApp exchange, ML indicated to OZ that she would not be willing for him to stay in the same house as her and the Children and from her oral evidence I am satisfied that was because she was fearful of him. She was to my mind put in fear for her personal safety as a result of OZ’s oppressive demands of control, but also physically following the incident during his visit in February and March 2022 when he had broken through the bathroom door whilst she was in the shower and forced himself upon her. This prompted an outpouring of expletive and abusive language in the message exchanges from OZ and his anger and determination to seek retribution are palpable.

108. The documents are consistent with the change of plan and, whilst it is clear from the single word answers of ‘okay’ repeatedly given by ML to OZ’s questions that she was reluctant to agree to come to Kazakhstan, was clearly feeling the pressure of OZ’s anger and abuse and may even have intended to try to seek to negotiate a way out of the trip in due course, I find that she did communicate in that WhatsApp exchange her agreement to fly back with the Children. In response OZ immediately booked flight tickets for 30th December 2022. ML and the Children did not board that flight and in the circumstances, I find that the date of retention of the Children by ML was 30th December 2022.

Habitual residence

109. For the reasons I set out below, I am satisfied that the Children were habitually resident in England and Wales on 30th December 2022.

110. I do, of course, have full account of the fact that the Children have Kazakh nationality and speak Russian as their first language and that they have wider family on both the paternal and maternal sides in Kazakhstan. However, these factors carry relatively little weight in circumstances where the Children had retained cultural and linguistic ties through their mother and were maintaining regular contact with their father and where the evidence is that the Children enjoy regular videocalls with the maternal grandfather and have a good relationship with him.

111. The intention of the parents is a relevant consideration, but is not determinative of habitual residence.

112. If one considers the terms of the agreements of 25 October 2020 and 16 August 2022, they indicate that, subject to an extremely high degree of control and monitoring, OZ *did* consent to the Children being brought to England in first in November 2020 and then again in September 2022 for the purpose of living in England. Indeed, the whole point of the agreement was that ML, and the Children would be settling here for some time. Whilst OZ would not be accompanying the family, that was all part of the pre-planning.

113. Moreover, the agreements do not provide much real assistance when considering the stability of the residence of the Children in England. The terms have a great deal to say about OZ’s wishes regarding its potential permanence, but it is not necessary for a move to be permanent for a child to acquire a habitual residence.

114. After that, in evidential terms, there is little, if any, material dispute about the day-to-day nature of the Children’s lives in England since November 2020. At this level, it is difficult to imagine a more settled or habitual type of existence and hard to see in what other ways these particular Children could have become more fully integrated into making their lives in England. Every aspect of their day-to-day living was consistent with the nature of their residence here being habitual.

115. Mr Lue, counsel for OZ, invited me to find that during the period in the summer of 2022, that the children had, very shortly after return to Kazakhstan, re-acquired a habitual residence there. I cannot accept this submission.

116. That trip was intended as a short visit, of a week, as shown by all the evidence, importantly that of the Children as well as the contemporaneous email exchanges between ML and the school and also the return flight tickets. ML had to return to England alone and not as planned. I reject OZ's suggestion that there was any plan for the Children to move to live in Kazakhstan when they flew out. I accept that OZ forced the issue by destroying the Children's travel documents.
117. Thereafter, any roots which the Children put down in Kazakhstan were not deep. Throughout their stay they were looking forward to an eventual return to England. I accept the evidence that during the summer of 2022, whilst ML was in England and they remained in OZ's care, the Children were unsettled, being passed between a nanny and teenage cousins for bath time and other intimate care, which they found confusing and in the case of the older Children, inappropriate and distressing. They were missing their mother and were away from their toys, books, friends, school, and classmates. I also accept the evidence of the guardian that the Children notably were unable to say anything positive about the schooling which they received in Kazakhstan, in stark contrast to their response to school in England. I find that they were struggling to come to terms with the abrupt change of their plans and had no knowledge of how long the situation was going to last.
118. The Children missed pre-planned birthday parties and playdates with their friends. There is no evidence that they were given any assistance in finding a new friendship group or otherwise being helped to 'settle in'. For one thing, there appears to have been no reassurance as to when they would see their mother again. I find that in fact the Children were completely reliant on their mother's nightly calls for their only emotional support. It was a chaotic and unsupported existence framed by the uncertainty of knowing when it would end. The evidence shows that contact with the maternal family during that summer was practically non-existent and that OZ did not create any stability in their lives. Whatever ties the Children established in Kazakhstan were not strong and quickly subsided in September 2022 when they came back to England.
119. M in her interview with the guardian talked about how the Children all saw their return from Kazakhstan in September 2022 as a resumption of normal home life. They went back into their previously settled existence and routine very quickly. I find that in the case of the older two Children, this would have happened within a matter of days. The evidence demonstrates that the youngest child needed to be re-settled at nursery, and this took 3 or 4 weeks.
120. The Children returned to their previous school places and re-joined the after-school clubs, including chess club, about which both A and M are enthusiastic, M was able to hold her post-dated birthday party with her friends. ML re-started her studies and was able to re-commence a part-time teaching role at the university. She re-established her contacts with colleagues and her own friendship group. They were reunited with all their possessions, including the Children's toys and books which had not been taken to Kazakhstan. The previous routine of video call contact with OZ resumed.
121. The totality of the evidence paints a consistent picture of a settled and contented existence for the Children substantially if not fully integrated within both the social and family environment in England. Their evidence to the guardian demonstrates that the Children see England as the place where they belong and where their lives are based.

That is entirely to be expected given the wider circumstances. They each have an extremely strong bond with ML who has always been their primary care giver.

122. Having regard to all these factors, including what I find was the clear intention of OZ that the Children would only stay in England at his discretion and on a temporary basis, I am easily satisfied that as of 30 December 2022 the Children were habitually resident in England and Wales for the purposes of Article 3 of the Convention.

Harm Or Intolerable Situation

123. It follows, therefore, that strictly speaking, there is no need for me to consider the application of the exceptions to the Convention, because the Convention does not apply. However, as I have heard all the oral evidence and given the length of time these proceedings have taken to reach final hearing, I have decided that it is better for me to give a determination on all the issues. The remainder of this judgment is therefore given on the basis that (contrary to my view) the Children were habitually resident in Kazakhstan on 30 December 2022.
124. The harm or intolerable situation exception potentially arises in this case in two ways. First, there is separation from ML as their primary carer and the prospect of return to harm to which they would be potentially exposed to as victims of alleged domestic violence. Secondly, there is the question about separation of X and Y in the event that either A or M have raised objections to which the court must have regard. I deal with that second situation below.
125. I am satisfied that ML will not return to Kazakhstan, even if the Children are ordered to return. OZ stated in his oral evidence his view that the effect of a return order would be that ML would be forced by reason of her strong emotional bond to follow her Children, but having had the benefit of seeing her give her evidence and noting that ML has been consistent in her position in this regard I do not think it at all likely that she will change her mind. It is her considered decision and is consistent with the fact her life is now here in England. There is little or nothing for her to return to in Kazakhstan.
126. The evidence shows that ML was placed under significant pressure to sign the October 2020 and August 2022 agreements to secure the return of the Children. She tells me in oral evidence, and I accept, that at the same time she was made to attend a notary's office to sign a power of attorney in respect of her interest in a flat in Kazakhstan, which OZ has since transferred at an undervalue to one of his brothers, leaving her with nowhere of her own to live in Kazakhstan. It was apparent during his evidence that OZ anticipated that ML would come and live with him and the Children on a return to Kazakhstan. It was only when he later realised that it was potentially helpful to his case, that he suggested for the first time that he would agree to a divorce and finance a separate place for ML to live. I do not believe him. I consider that his intention is to get the Children, and then ML back to live with him as before as he expressed to the guardian in his interview with him and earlier in his oral evidence to me.
127. I accept ML's evidence that OZ would ensure that he maintained control over her and that would exclude any possibility of completion of her studies or a future academic career. The unusual feature of this case is that OZ is well positioned in commercial and political circles in Kazakhstan and has the power and influence at his disposal to enforce her compliance with his wishes. ML's view is that he will use that influence either as

punishment for what he perceives as her ‘betrayal of his trust’ (his words) or as way of protecting his public reputation (about which he has shown considerable concern in these proceedings and which features expressly as a concern in the 16 August 2022 agreement) as having a dutiful wife and family. I share that concern, not least because he repeatedly threatens her in the message communications ‘to take this to the end.’ The episode concerning the arrest and detention in custody of ML’s father demonstrates a willingness on the part of OZ to utilise state institutions as a vehicle for his campaign to get ML to comply with his vision of a good wife and mother.

128. It would see the end to her years of hard work and ambitions for the future and would see her returning to a life of servitude. Whilst she would find it extremely punishing to be without the Children, it seems to me that she has made up her mind that to stay alone would be the lesser of two evils.
129. In the circumstances, I consider that the situation is rather different to that which faced the courts in cases such as *C v C*. In my judgement, it is OZ who is creating the situation where the Children would be returned without their primary carer and is forcing her to choose between her settled life in England and her Children. This is not an instance of ML seeking to deliberately frustrate the operation of the Convention, but rather a case where the Convention is being invoked as a tool to exert pressure on the mother to return.
130. In respect of the allegations of domestic violence, I take them, as I must for present purposes, at their highest in terms of the evidence of risk they present. Save for the incident of rape in February 2022, there is no allegation of physical violence against ML or the Children. There is clear evidence of harm which the controlling and coercive behaviours have had on the Children. They are aware that their mother is under pressure to comply with their father’s demands and have lived with the experience of his controlling and surveillance behaviours through the devices. They have been subjected to his financial blackmail - when for example he has promised A an electric ride-on car toy and new clothes and shoes if he comes back to Kazakhstan and they feel the anxiety he creates if they try to express a view which would be unwelcome to him. They are fearful of displeasing him and are careful not to say things he would not like.
131. I agree with the guardian that OZ has only limited insight into the impact of his behaviours on the Children. The evidence demonstrates that during the summer of 2022 when they were staying with him and ML was in England, he did nothing to ameliorate their distress or to seek to secure their emotional stability. In his evidence to me he was very concrete and showed no recognition of the Children’s psychological or emotional needs or any harm that they have already suffered.
132. Moreover, the protective measures provided by Kazakh law are likely to be wholly inadequate to meet the considerable challenge posed by OZ in the specific circumstances of this case. I am concerned that the Kazakh proceedings to date have had no regard to the coercive control of the father of the mother, its impact on the Children and have expressly departed from the views of the expert psychologist in respect of the Children’s objections. The validity of the agreements has been upheld without any consideration of the domestic violence or wider allegations concerning the maternal grandfather’s arrest and detention on blackmail charges. It is notable in my view that the judgments of the courts in Astana demonstrate distaste at the mother’s

application for protective measures and her temerity to speak out appears to have weighed very heavily against her with the courts there.

133. This is particularly so where the evidence of the Kazakh law expert, which is uncontested, is that the parties will be encouraged to reach agreement outside of court. The evidence shows a lack of genuine scrutiny of the agreements, and I consider that given OZ's relative influence and means, it will provide wholly insufficient protection to ML as the much weaker party. There is no reasonable prospect that ML would be able to secure any agreement with OZ which protected the Children, and they would be wholly exposed to his controlling and coercive behaviour.
134. In the course of closing submissions, Mr Lue for the first time slated a list of possible protective measures to which OZ had given instructions which he would agree, including removal of the 'live with' order of the Kazakh court and to enter an agreement for contact and other arrangements with ML. As I said before, this was the first suggestion of any negotiation or concession by OZ and I discount it as being a stratagem to suggest to me that he would in future behave reasonably with regards to ML and the Children. I do not consider it at all likely that OZ would honour any of these vague commitments once the Children returned.
135. I agree with the guardian that removal of the Children in these circumstances, who have effectively had ML as their primary carer for their entire lives into a situation where their carer has only limited insight into the psychological impact and there is no strategy either practical or legal for managing that situation would expose them to a very grave risk for their wellbeing. I consider this very likely to happen, because OZ's stated objective remains to secure the return of ML to Kazakhstan to live with him. Indeed, I consider it likely that he will continue to use the Children as tools to create additional psychological pain in his efforts to force the mother to return. That is intolerable.

Child's Objections

136. I am satisfied that the views expressed by the Children were made freely and by their own choice. I reject the suggestion that ML has sought to influence the Children. Both A and M gave the guardian evidence that ML had told them to tell the truth about their views. I accept that is what happened and what they did.
137. ML has shared her position about staying in the UK with the Children. She came in for some criticism from Mr Lue on behalf of OZ for having done so, but I accept her evidence that she was left with little choice after OZ told the Children that if they came to Kazakhstan, their mother would follow them. ML's evidence is supported by her account of her treatment in Kazakhstan at the hands of the paternal family and OZ himself, in particular the incident in which he destroyed the Children's travel documents and removed hers. A and M each share the view that their mother's settled intention is to remain in the UK, even if they must return.
138. I accept ML's evidence that at times she has been left with little option but to discuss some of the wider family problems with them, especially the older Children, for example in relation to money, because OZ has withdrawn support and ML's scholarship funding was withdrawn. She tells me, and I do not believe this to be disputed by OZ, that he has not made any payment to the maintenance of the Children, save for paying £16 for A's hair to be cut, since December 2022. The Children have needs which cost

money and she has had to explain that without their father's financial support, they will sometimes have to do without. By contrast, OZ told A when he asked him directly for money for new shoes for school, that he could have them when he came back to Kazakhstan. It is OZ in my judgement who constantly seeks to draw the Children into the dispute over their futures, with a mixture of threats of withdrawal of love and attachment, financial pressure, and frequent and unpredictable outbursts of aggression. The evidence shows that OZ deploys all these tactics directly on the Children to get them to say what he wants them to say about where they want to live.

139. Another example is in relation to the comment made by A to the guardian that his father told him to tell the guardian that he wanted to live in Kazakhstan. Mr Lue does not challenge that statement, but nevertheless invites me to find that it was ML was influencing the Children because A had been made aware that the Court in Astana had made a finding 'which was a mistake'. That criticism seemed to me to be illogical: A obviously knew about the Astana proceedings because he had been interviewed for them. He would clearly be interested in the outcome and was frankly entitled to be told. The opinion that the decision to return him to Kazakhstan 'was a mistake' was, in my judgement, his own and there is no evidence to support the suggestion that he was influenced in reaching it.
140. The evidence shows that the Children are comfortable to express disagreement with ML – the fact that A can make a joke of his mother's displeasure at being disturbed at her desk by noise shows that he is safe and secure in his relationship with her sufficiently to know that he can express to a third party a different viewpoint to hers.
141. I am also entirely persuaded that A and M are both of an age and maturity that account should be taken of their views in relation to a possible return to Kazakhstan. I completely accept the written assessment of the guardian with respect to M which he expanded upon in his oral evidence. She is in my view well of an age and maturity to understand both the short and long-term implications of a choice about where to live and the impact that would have on her relationships with people, places, and the culture of each.
142. As for A, it seems to me that he is an intelligent boy, capable of rationalising based on experience. I consider that his ability to contemplate the possible risk to his mother of confiscation of her travel documents, based on what his father did in May 2022, and the fact that would influence her choice whether to travel to Kazakhstan to visit, demonstrates, contrary to what OZ submitted, that he does have clear recall of events and is able to weigh up what he does and extrapolate as to what may in future occur. This requires maturity and analysis not only in line with, but potentially beyond his chronological age. His expression of his views took account not only of his immediate concerns but included long-term ambitions to build a life and find a career in England.
143. I am satisfied that both M and A have each raised an objection to return to Kazakhstan of which I ought to take account. A expresses his objection in clear terms and not in the form of a hope, wish or preference. I note that he is worried about the prospect of being returned against this view. M expresses a clear unwillingness to return which on the evidence as whole goes beyond a preference to stay but amounts to an objection.

Discretion

144. The question therefore arises how much weight I should give to these objections, bearing in mind that the Convention only works if generally speaking children who have been wrongfully retained away from their country of habitual residence. I also bear in mind that comity between Convention states and deterrent effect for potential abductors are proper and real concerns to ensure the effectiveness of the Convention generally.
145. The objections of A and M are, for the reasons I have set out above in respect of the intolerability and harm exception, entirely consistent with their immediate and longer-term welfare needs. ML has been their primary carer for their entire lives and a move to Kazakhstan would place them outside their mother's care and into a situation where they would be inadequately emotionally supported and at risk of further harm as the father seeks to control the actions of the mother and force her return to Kazakhstan. In circumstances where the objections are strong and an expression of the Children's own will against a background of living in England for nearly 3 years, I do not see any risk of undermining the philosophy of the Convention in refusing a return order in these circumstances and I do not consider a refusal to return to be in anyway inconsistent with the spirit or the terms of the Convention. Nothing I have concluded in this case on its rather particular facts casts any wider shadow in respect of other cases concerning Kazakhstan or its institutions or processes. I am satisfied that a return order ought in all the wider circumstances to be refused.
146. Further, and to the extent it is necessary considering my findings above, I am also satisfied that X and Y in intolerable situation should they be returned without A and M in light of their valid objections to removal. This finding is uncontroversial because both parties accept that this tight knit sibling group cannot be broken up and it would clearly be inconceivable to do that.

CONCLUSION

147. In the circumstances, the application is dismissed.
148. With respect to the welfare of the Children, I have been invited to make further orders about which I have not yet heard any submissions. I have invited Counsel to agree as much of a draft order as is possible and will hear further submissions on consequential orders at 2pm on Monday 2nd October 2023.