Neutral Citation Number: [2022] EWHC 3564 (Fam)

Case No: FD19P00173

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

**Before:**

**THE HONOURABLE MR JUSTICE FRANCIS**

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# Re L (Return Order: Set Aside Application)

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**PROFESSOR R GEORGE** (instructed by **Messrs IMD Solicitors**) for the **Applicant**
**MR H LANGFORD** (instructed by **Messrs Beck Fitzgerald)** for the **First Respondent**
**MS R MITCHELL** (instructed by **Messrs Creighton**) for the **Second Respondent (through the Children's Guardian)**

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**JUDGMENT**
**29 SEPTEMBER 2022**
**(AS APPROVED)**

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*WARNING: 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.*

MR JUSTICE FRANCIS:

1. This week I have been concerned with Lena (which is not her real name) who was born in England to Polish parents in 2009 and she is therefore now 13 years old. In this judgment I shall refer to Lena's parents respectively as the mother and the father.

2. By an application dated 22 June 2022, the mother asked the court to set aside or discharge an order made by Mr Teertha Gupta QC, sitting as Deputy High Court Judge on 18 July 2019, and the order made by Keehan J on 14 November 2017. The order of Keehan J reiterated an order made by his Honour Judge Nathan on 18 September 2017. These were orders requiring Lena's return to this jurisdiction from Poland. It is not in issue that Lena was wrongfully retained in Poland by the mother following an agreed two week trip in July and/or August 2017.

3. The grounds asserted by the mother in support of this application are - and I quote from her Notice of Application:

> "(1) Three years have passed since the order and the welfare basis on which the original order was made has fundamentally changed such that it would be inappropriate for it to be enforced now without further consideration;
> (2) "Substantial changes regarding the child's welfare".
> This case concerns the relevant test to set aside an Article 11(6)-(8) application, whether that test is met, and if the order of Mr Gupta dated 18 July 2019 should be set aside.
> Whether the order of Keehan J dated 14 November 2017 should be set aside and if I do set those orders aside, what are the next steps?"

4. The chronology in this case is largely undisputed. The parents met when they were young but were not initially close. The father moved to the United Kingdom in 2002. The mother moved here in 2003. The parents married in 2008 and Lena was born in the UK in 2009 in London. Lena is a British National. She previously held a British passport but I am told she does not currently have a valid British passport. Lena's home was in the UK from her birth until 2017 when she was retained in Poland in circumstances to which I have just referred. She and her parents also spent substantial time in Poland before 2017, including some time in 2011, and I am told a couple of months almost every Summer and some time at Christmas and other ad hoc visits.

5. In 2017, allegations of sexual abuse were made against both the father and the paternal grandfather with criminal charges having been brought in Poland against both men. The charges against the grandfather had been dismissed but it is at least possible, if not likely, that the prosecution will seek to appeal that decision in Poland. Obviously I make no comment in this judgment about the sexual abuse allegations other than to note their existence. It is neither necessary nor appropriate for me to comment on the merits or veracity of those allegations. I have not conducted a fact finding hearing and no one has - at least yet - invited me to. I have not heard any oral evidence.

6. Both counsel have suggested to me during the course of this hearing that it may become necessary to have a fact finding hearing to establish the truth. I have not at the moment come to any conclusion about that and will hear submissions about it later as and when they may be appropriate. I am conscious of the fact that there are ongoing criminal

proceedings in Poland against the father.

7. As I set out above, the mother had permission to take Lena to Poland for a holiday in July 2017. She never returned to the UK with Lena. Lena was made a ward of court by the English courts and return orders were made initially by his Honour Judge Nathan on 18 September 2017 and then by Keehan J on 14 November 2017. The father also initiated Hague Convention proceedings in Poland. His application was dismissed by the Polish court on 6 December 2018 on the basis of Article 13(b) and Article 20. The father appealed that order but his appeal was dismissed on 27 May 2019 and thus it was that the Polish court declined to order Lena's return.

8. The father had also applied under Article 11, Brussels II(a) for an overreaching return order and this is what came before Mr Gupta QC in July 2019. The mother did not appear at that hearing and nor was she represented. The deputy Judge rejected the suggestion that Article 20 was engaged by the Polish court but he found that he did have jurisdiction under Article 11. This led to the return order which was dated 18 July 2019 and which the mother now asks me to set aside.

9. Lena's Guardian applied under the inherent jurisdiction of the High Court in England for wardship as long ago as 6 September 2017 in circumstances where the mother had not returned Lena to this jurisdiction. On 20 March 2022, so, four and a half years later, the Guardian applied to be discharged as a Guardian given the lack of progress in the High Court. By an order dated 30 June 2022, the Guardian was directed to file a position statement by 18 August setting out the discussion which she has had with mother and what are her recommendations to the court. This date was later extended by consent.

10. The Guardian has today been represented in court by Ms Mitchell of counsel. The father was represented by Mr Langford and the mother by Professor Rob George. I am grateful to each of them for their clear and helpful submissions.

11. The Guardian reports that she has spoken to Lena over a video call on 8 August 2022, only a few weeks ago, supported by a Polish interpreter. The Guardian reports that Lena remembered going to Poland for a holiday with her mother and saying that she did not want to return to the UK when the holiday was ending. The Guardian reports that Lena said that she felt safer in Poland and she had family whom she could rely on there, especially maternal family. She told the Guardian that there was not anything that she misses about being in the UK. She described her father to the Guardian as a bad person and referred to him as harming her and someone that has made her suffer. She said that she did not want to be back in the care of her father. She told the Guardian she had been harmed by him to an extent that she is unable ever to forgive him. She said that she was unable to remember anything positive about her father.

12. The father's response to this is that the mother has deliberately alienated Lena from him. There is in these cases always a risk if a child is not reporting his or her own views but views that have been acquired by the parent who has sought to influence or sometimes they even brainwash a child into a particular position. Obviously, it is important that both of the parents hear me say this although it would be obvious to their legal advisers: I am unable to make any findings either way at this stage and I expressly do not need to do so and have not done so. It seems to me that these are the possibilities, either:

(a) the father sexually assaulted his daughter; or
(b) the mother has made wicked and scurrilous false allegations against the father; or, I suppose

(c) the mother has an honest but mistaken belief.

As I say, it is not for me to make any findings in relation to these possibilities.

13. It is a tragic situation for Lena to find herself in. She is thirteen and her parents have been litigating about her for not far short of half of her life. It is a terrible position for a child of her age to be in and she should not be in it. Lena sent a letter to the court which the parties all agreed I should read and I set it out here. Lena said this:

> "Dear Court, I hope you make a decision which is good for me, namely that I remain in Poland. I do not intend to return to England. I would rather kill myself than return there. I have provided my reasons in my conversation with [the Guardian] as well as before the specialists and courts in Poland. I will not return to the place where I was hurt. I do not want to go back to that. I want to live normally and forget about the things that happened to me. Here, I have plans for the future. I do not have anyone in England. I feel safe here. I will never return there. I ask the court to listen to me.".

14. At the outset of this hearing, and not in any sense to pre-empt what I was going to decide, for I had no idea at that point what I was going to decide, I raised with Mr Langford, counsel for the father, what the practicalities were going to be in terms of arranging for Lena to return to England if his application was successful. Mr Langford said that he recognised that Lena could not live with her father at the moment given the investigation of the allegations to which I have referred above. I asked Mr Langford: how is it proposed in practical terms that Lena will be transferred to England? He said that if necessary the Polish authorities would arrange for police and social services to escort her to the airport.

15. The father's plan is that Lena will be uprooted from the home where she lives safely with her mother and other maternal family members, leave the school that she says she enjoys, and come to a country where she has only a few family members and will be unable to spend, at the moment at least, unsupervised time with her father. She also apparently has limited English although I note that she did spend the first few years of her life in England as set out in the chronology above, and I imagine would probably pick up the language again fairly easily.

16. However, against that, I must recognise that if the mother is deliberately alienating Lena from her father, it could and probably would cause significant harm to Lena to remain living with that alienating parent and to be alienated from her father. I also fully understand the strong contention that it would send the wrong signal if the mother was to be rewarded for her wrongdoing by allowing Lena to stay with her in Poland. This is a very difficult dichotomy.

17. Lena asked if she could meet the Judge. I canvassed this with both parties and with the Guardian and it was agreed by all that I could meet remotely with Lena, supported by her Guardian, the Guardian's solicitor, and an interpreter. In the event the Guardian was unavoidably called away to other pressing matters and I took the view, and again I discussed the matter with counsel for the Guardian and for the mother and the father, that it would be unfair to let Lena down having arranged to meet at 4pm BST on the first day of this hearing, two days ago.

18. Accordingly, I met remotely with Lena in the presence of her solicitor and a Polish interpreter. A full detailed note of our meeting has been taken by the Guardian's solicitor and distributed to the parties and their advisers. The meeting took place online via Microsoft Teams and I understand there is also a recording of our meeting. I was immediately struck by Lena's emotional intelligence and her warmth. She asked me the interesting question of whether the decisions that I have to make as a Family Division Judge weigh heavily on my conscience. It seemed to me that that was a remarkably mature question for a 13 year old girl to ask. I established with her that there was no one else in the room and I am satisfied that she was telling me the truth about that and that she was talking to me unprompted and telling me and asking me what she wanted to tell me and to ask me. I am satisfied with the questions that I have just referred to emanated from her as did all of the questions that she asked me, and I have no reason at all to suggest that she was put up to say anything that she said.

19. Lena expressed to me the very strong view that she wishes to remain in Poland with her mother. Of course, I made it clear to her that I was not receiving evidence from her and I made it clear to her that I could not just wave a magic wand and make things happen that she wanted to happen. I explained of course to counsel, as they know only too well, that this was not in any sense an evidence-gathering process. It seems to me that if a young person - 13 years old in this case - asks to meet the Judge and look in the eye the person who is going to be making decisions about them, that it is a proper thing for a Judge to do and would, it seemed to me, to be rude of me not to have agreed to meet her. It was a very congenial meeting and I explained to Lena that I was impressed with the way that she put it that she wanted to meet the person that was going to make the decision about her. Lena was, if I may say so, a credit to each of her parents. She is obviously a delightful and intelligent young person.

20. It would be clear to anybody reading or listening to this judgment that further litigation is likely, whatever decision I make today as the pain and anguish for this family, but particularly for Lena, may yet go on. Mr Langford very reasonably told me that I should be very wary indeed of rewarding mother's conduct in wrongfully retaining Lena in Poland. The floodgates argument is always likely to be of concern to any Judge in this type of case. However, the facts of this case are, I suggest, more than unusual. I am in the early Autumn of 2022 dealing with a return order that was made as long ago as 2017. Put another way, significantly more than a third of Lena's life has passed since the first return order was made.

21. The mother criticised the father in not having made an application to enforce the return order before he did. Professor George on behalf of the mother refers in his skeleton argument to the father's complete lack of action to seek enforcement. Whilst this criticism is well-founded, I am bound to say that it does rather lie ill in the mother's mouth to criticise the father's lack of action in enforcing an order that was, after all, only needed because of the mother's decision wrongfully to retain Lena in Poland. That is the reason there were proceedings. It was the mother who made the first wrongful act in retaining Lena in Poland.

22. However, I do think that it is necessary to consider the father's explanation for the delay. He has made serious allegations that the Polish courts are exceptionally corrupt and biased in favour of mothers. This is a submission which I found entirely unable to accept unless provided with credible evidence to support it.

23. It seems to me that the essence of the safe and sound working of the Hague principles

and, the European Union of the regulations relating to the return of children to member states, must be founded in mutual respect of each other's legal systems. In my judgment it would be wholly wrong for me to sit here in London and criticise the workings of the legal system, the courts, or the judiciary in another country, be it Poland or anywhere else. I am not prepared to do so, particularly based on the broad assertion by the father as it is, at least unless presented with expert evidence to support such an assertion.

24. Professor George points out, and I agree, that the father's arguments are entirely inconsistent. The father says that there was no point in applying to the court until the case against him had been determined and yet his application for enforcement was made in March 2022 while the criminal case against him remains outstanding. It does not seem to me to provide a good reason for such a long delay in the father seeking to enforce the order, nor any explanation why he suddenly did apply for enforcement in March 2022. Having said all of that, I repeat my observation that limited importance should be given to the complaint by the mother that the father delayed enforcement when, as I have said, it was her own actions that brought the need for orders in the first place.

25. I remind myself that the father's 1980 Hague Application was refused by the Polish court on 6 December 2018 on the basis that an Article 13(b) defence was made out. The father's application to the High Court in London is pursuant to Article 11(6). It is acknowledged by both Professor George for the mother and Mr Langford for the father that the orders made by his Honour Judge Nathan, Keehan J, and Mr Gupta were all to some extent at least welfare based orders. And as usual, the orders made by his Honour Judge Nathan and Keehan J were made without substantive evidence being heard on a summary basis. Of course, as is well known, it is unusual to hear evidence in these cases. I am told that the father's application for a return which he made to the Polish courts lasted for some 14 months with there being 18 hearings. To someone sitting here, I am sure the lawyers in this court and to me, dealing with so many Hague cases and Council regulation cases, the whole essence of the proper management of Hague applications is that they are determined quickly and in a summary fashion. We, in London, make a point of forcing these cases into the list so that we can deal with them within a six week timetable where we can. Even if not that then we deal with them here really very quickly and on a summary basis.

26. It is also worth pointing out here that judges dealing with Hague cases, such as I often do, often find, and I find myself having to make orders pursuant to Hague which are at odds with my instincts regarding the welfare of the child. Of course, we are guided in these courts most of the time by the paramountcy principle set out in in section 1 of the Children Act.

27. Professor George for the mother submits, as I agree, that it is difficult to work out what the jurisdiction was as considered by Mr Gupta when he made his orders. He points out that the orders were all headed with three different legislative provisions; the Senior Courts Act 1981, the Children Act 1989, and the Brussels Regulation. The term of paragraph 1 of Mr Gupta's order states that it is made pursuant to Article 11(6)-(8). Professor George submits that the order was not made under any power within the Regulation. Article 11(6)-(8) deals with enforcement of the order and not with the making of the order itself. It seems to me, accordingly, that the principles applicable to applications to set aside 1980 Hague Convention final orders are not directly applicable to the mother's application to set aside the Article 11(6)-(8) return order. I agree with Mr Langford's submission that the application to set aside the Article 11(6)-(8) return order should be approached differently in the light of the decision of the Court of Justice of the European Union in *Povse v Alpago.*

28. It is appropriate at this stage that I set out what it is that the relevant Council Regulation

says. I am conscious of the fact when dealing with this today, and of course since Brexit, the importance, if any, of what I am saying beyond the importance to this family itself, will be very limited. Article 11 is headed "Return of the child" and it is worth just going to the top of these Regulations to see also what the general heading is. It says as follows: "Council Regulation EC No.2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.".

29. And then if I go to Article 11 itself, as I say the heading is "Return of the child" and then it says as follows:

> "(1) Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 'the 1980 Hague Convention'), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.".

30. Moving down to Article 11, paragraph 6, it says as follows:

> "If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order."

31. Paragraph 7:

> "Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so

> that the court can examine the question of custody of the child.".

I would highlight and underline at this point: "so that the court can examine the question of custody of the child", and I will return to the importance of that sentence shortly.".

32. Paragraph 7 then continues:

> "Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.".

33. And then finally paragraph 8 of Article 11 says:

> "Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention," - which of course is the case here - "any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.".

34. In other words, there are circumstances where, as here, the foreign court has made a non-return order, as here - Article 13, and then there is the provision in this Article that I have just referred to for the application which is the one that the father made and came before Mr Gupta QC.

35. I have been referred to an important decision of Theis J in *D v N & D (by her Guardian ad Litem)* [2011] EWHC 471. I do not need to set out the facts of that particular case. Theis J was concerned there with the jurisdiction in the same way albeit in different circumstances that I am addressing now. This case also concerned a Polish mother but in that case it was a British father and they too lived in England with their child. When the child was three the couple travelled to Poland for a holiday. When the family was due to return to England the mother refused to do so retaining the child. The father returned to England alone but shortly afterwards issued Hague Convention proceedings. The Polish court accepted that there had been a wrongful retention but considered that the mother had established both that the father's alcohol consumption posed a great risk in Article 13(b) of the Hague Convention and that the child then aged three years and eight months old objected to a return. The Polish court were bound to refuse to return the child having made no reference to Article 11(4) BIIR which provided that the court could not refuse to return the child under article 13(b) if adequate arrangements could be made to secure the child's protection.

36. The mother then issued proceedings in Poland to limit the father's parental responsibility. The Polish law return order triggered the provisions of Article 11(6) to (8) of BIIR and the father sought an order in the English court that the Judge return under Article 11(8) and so there are many similarities between that case and this with the coincidence of the fact that this was a part-Polish case itself is of course irrelevant.

37. The English court made the child a party to the proceedings, very much as what has happened in this case, but ordered contact. The Judge ordered the child return and granted a certificate under Article 42 of BIIR. The court held that: "The interrelationship of Articles

10 and Articles 11(7) and (8) of BIIR permit the State of habitual residence (from where the child has been wrongfully removed) to undertake an examination of the question of the custody of the child, once a judgment of non-return pursuant to Article 13 of Hague has been made by the Requesting State.

38. The foundation for this welfare jurisdiction, said Theis J, was based on Article 11(7) and need not be categorised as deriving from or relying on the inherent jurisdiction. The court would in any event have to direct itself to the welfare checklist once the child was returned, if not before.

39. Moving to paragraph 39 of Theis J's judgment, she said: "The position can be summarised as follows", and then I move forward to sub-paragraph (5) of that and she says:

> "It may not be necessary or appropriate to categorise the jurisdictional foundation for such an enquiry as deriving from, or relying upon, the inherent jurisdiction. The foundation for any examination of the question of the custody of the child is simply through the gateway of Article 11(7).".

40. I said when I was quoting Article 11(7) that I would, as it were, if I was writing this underline and put in bold a particular sentence and I now return back to that. Article 11(7), the message which I would have underlined would be "so that the court can examine the question of custody of the child". Theis J was clear in her view that she should accept that that was the jurisdictional basis of what she was being asked to do, the jurisdictional basis of the possibility of the court returning pursuant to Article 11(6)-(8).

41. In paragraph 39 (8) of her judgment, Theis J said this:

> "In deciding whether to order a summary return or to carry out a full welfare enquiry, the court exercises a welfare jurisdiction. (*M v T (Abduction: Brussels II Revised*). It is not all together clear whether the decision to order a return of the child on a summary basis is more appropriately considered as akin to that which might be ordered under the inherent jurisdiction or whether it is effectively a specific issue order under the Children Act 1989 order: if it is more appropriately considered as akin to the inherent jurisdiction then – at least as to the question of summary return – it may not be necessary for the court mechanistically and slavishly to direct itself to the welfare checklist; that having been said, once the child has returned and the court is considering what order to make the court should direct itself to the welfare checklist.".

42. Mr Langford submits that the foundation for the jurisdiction exercise by Mr Gupta was Article 11 itself. That of course was the view taken by Theis J in the way that I have just set out. Professor George takes issue with this. He says that this provision does not confer any power on the court in this jurisdiction but merely provides that any return order properly made here shall be enforceable in accordance with the provisions of the Regulation, irrespective of the non-return order made in the other State. He says that an order for the return of the child must either be a specific issue order under section 8 of the Children Act or an order pursuant to the High Court's inherent jurisdiction. He says that given that Lena was a Ward of Court prior to the making of these orders, it may be most likely that they are

orders under the inherent jurisdiction. It was noted, he says, the order is also headed as being under the Children Act and as I have said, it is also headed as being under the Regulation.

43. I am going to turn in a moment to what difference, if any, this issue actually makes, but it seems to me having read the judgment of Theis J, whilst I am not bound of course to follow her being a Judge of, as it were, equal equality in terms of the document precedent, if I am going to disagree with what she says, I have to have substantial reason to do so. I find myself in any event in agreement with Theis J that the jurisdictional power does arise as I have just set out from those words in Article 11(7).

44. Normally, an application to set aside a Judge's order is brought back to the Judge who made the order. In this case, because it was a Deputy High Court Judge, Mr Gupta QC, KC as he now is of course, it has not been possible to bring the matter back to him because of his diary and he did not have any sitting commitments which were consistent with the need of this case to be heard and hence I am dealing with it now. And indeed, Roberts J certified of this case as being fit for vacation business. It is technically still vacation.

45. It would have been interesting to ask Mr Gupta what he said the jurisdictional basis was of his order but sadly that question has not been asked of him and it seemed to me that if had simply been presented with that question now about something he did some years ago, he would be likely to say, as any of us would, that we could not really remember what we were doing three years ago, he would need to read right back into it and rightly, I think, the decision was made that time did not really permit for him to do that. And so, I have to consider the matter afresh and also, as it were, to try and put myself in his shoes as to the jurisdictional basis of his order at the time.

46. Professor George says in his skeleton argument that the power of the court to vary or discharge or revoke its own orders depends on the court in which those orders were first made. Well, that of course is correct. He says that it is clear that the 2017 and 2019 proceedings were in the High Court as opposed to Family Court. Consequently he says, and I agree, the relevant powers do not fall under section 31F of the Matrimonial and Family Proceedings Act 1984 but under the High Court's general case management powers identified in particular in rule 4.1(6) of the Family Procedure Rules to vary or set aside decisions. It says simply this: "A power of the court under these rules to make an order includes a power to vary or revoke the order.".

47. I am not going to go through all of the authorities on this. They are set out comprehensively by MacDonald J in *N v J (Power to Set Aside Return Order)* [2017] EWHC 2752. After a lengthy review of the authorities, MacDonald J concluded, and I quote:

> "Having undertaken the foregoing detailed review of the authorities, I have decided that a High Court Judge does have power under FPR r 4.1(6) to set aside a return order made under the inherent jurisdiction by another High Court Judge where no error of the court is alleged but where there has been a change of circumstances, or a material non-disclosure, that goes to the welfare of the child.".

And so, there is no doubt, it is agreed by all, that I have the power to set aside this order, whether it is under the inherent jurisdiction, as MacDonald J just referred to in the case that I referred to, or whether it is on the basis referred to by Theis J deriving from Article 11(7). I agree with Professor George that the authorities and the approach on Wardship is going to be

relevant. He has referred me to the decision of Black LJ, as she then was, in the *Re H (International Abduction, Asylum and Welfare)* [2016] EWCA Civ 988 where her Ladyship said:

> "Once the return order in relation to A is seen as a product of the court's normal welfare jurisdiction in wardship, it seems to me that it should be evident that if the child's welfare so required, the court could revisit it. The idea that it would not be able to do so at all (because only the Court of Appeal could handle the matter), or not be able to do so unless strict criteria for setting aside an order were satisfied, runs counter to the purpose of wardship, which is designed to respond flexibly to the best interests of the child at any given time.".

48. Mr Langford of course, taking the, as I have referred to it, narrower focus and relying on Article 11(7), takes me to the decision of the European Court in *Povse v Alpago* [2010] 2 FLR 1343. The question that was posed was this:

> "Can the second State refuse to enforce a judgment in respect of which the court have already issued a certificate under Article 42(2) of the Regulation if, since its delivery, the circumstances have changed in such a way that enforcement would now constitute a serious risk to the best interests of the child? Or must the opposing party invoke that change of circumstances in the State of origin, thereby allowing enforcement in the second State to be stayed pending the judgment in the State of origin?".

49. The CJEU answers the question as follows:

> "By this question the referring court asks whether the enforcement of a certified judgment can be refused in the Member State of enforcement because, as a result of a change of circumstances arising after its adoption, it might be seriously detrimental to the best interests of the child, or whether such a change must be invoked before the courts in the Member State of origin, which would imply suspending enforcement of the judgment in the requested Member State, pending the outcome of proceedings in the Member State of origin.".

50. And then in my judgment, crucially, paragraph 81 as follows:

> "In that regard, a significant change of circumstances in relation to the best interests of the child constitutes an issue of substance, which may, in appropriate cases, cause the decision of the court which has jurisdiction over the return of the child to change. However, in accordance with the division of jurisdiction referred to more than once in this judgment, such an issue must be resolved by the court with jurisdiction in the Member State of origin. Moreover, that court, within the system established by the regulation, also has jurisdiction to assess the best interests of the child, and that is the court which

> must hear an application for any suspension of enforcement of its judgment.".

51. Before giving this Judgment today, I clarified with all counsel and they all agreed that the Member State of origin referred to in paragraph 81, and which I have just recited, would mean here England, that is, me.

52. In paragraph 82, the CJEU continued:

> "That conclusion is not called in question by the reference, in the first subparagraph of Article 47(2) of the regulation, to the enforcement of a judgment delivered in another Member State in the 'same conditions' as if it had been delivered in the Member State of enforcement. That requirement must be interpreted strictly. It can refer only to the procedural arrangements under which the return of the child must take place, and can on no account provide a substantive ground of opposition to the judgment of the court which has jurisdiction.".

53. And then importantly, in paragraph 83:

> "Consequently, the answer to this question is that enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment.".

Again, the Member State of origin as I have already set out above is England.

54. The difference between the jurisdictional basis is not altogether easy to discern but it is clear, I think, that what I now call the test following *Povse v Alpago* is a higher threshold than the, as it were, more regular test that we would apply in these courts stemming either from section 1 of the Children Act and the very well- known welfare checklist that follows it, or from the inherent jurisdiction, and it seems to me that any Judge, such as myself, sitting in the High Court exercising inherent jurisdiction would realistically have regard to the welfare checklist and the paramount in principle even though the inherent jurisdiction of course is out with the Children Act.

55. Mr Langford's position therefore is as follows, and he sets out the relevant test with which, having set out the reasons I will follow the decision of Theis J, I agree. He says as follows:-

(a) there must be a significant change of circumstances which is subsequent to the return order being made;
(b) the significant change of circumstances must be in relation to the best interests of the child;
(c) the change must be such that the enforcement of the return order might be seriously detrimental to the best interests of the child;

(d) the decision whether to set aside or stay the order or not is discretionary.

56. I accept that the policy consideration underpinning Article 11(6)-(8) are that the second bite of the cherry, as it has often been called, must be limited. It seems to me that it would undermine the purposes of the European Council Regulation and of Hague if we could simply under 11(6)-(8) then apply the welfare checklist without more when a return order has been refused in the other jurisdiction.

57. MacDonald J set out how he said the court with the jurisdiction should be applied in the case already referred to of *N v J*. He said in paragraph 76:

> "Having established the jurisdiction and the power of the High Court to deploy it, I turn finally to the manner in which the jurisdiction should be exercised. In the context of the order in question being one which concerns the welfare of a child, I am mindful of Black LJ's observation in *Re H (Child)* that to adopt strict criteria for setting aside an order concerned with the welfare of a child would run counter to the purpose of a welfare based jurisdiction designed to respond flexibly to the best interests at any given time. I also bear in mind the observation of Baroness Hale that the power must be exercised judicially and not capriciously and in accordance with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved. Finally, I also bear in mind the repeated warnings in the authorities on CPR r 3.1(7), echoed in the authorities concerning FPR r 4.1(6), that considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise apparently open discretion.".

58. I started with reference to what the Guardian said about Lena and what Lena has said to the court in the letter she wrote to the court and therefore to me, and when what she said to me in the conversation that I had with her through Microsoft Teams on Monday to which I have already referred, and being mindful of course of the fact that I was not gathering evidence from her, but was talking to her in the way that she wanted me to and she explained. It is important that I remind myself that the Guardian initially was supportive of the return at the time when the application was made several years ago. The Guardian has changed her position. The Guardian's position at this hearing is the return order should be set aside and that the proceedings in this jurisdiction should be concluded.

59. In her admirably concise skeleton argument, Ms Mitchell says:

> "This is not an easy position for the Guardian to take and she does not condone the mother's actions at all in respect of this litigation or indeed her conduct in general. And moreover, the Guardian raises the real likelihood of parental alienation of Lena by the mother against the father.".

60. She continues:

> "The court will note that the parties appear to agree that the

> return order of Mr Gupta dated 18 July 2019 was made on a welfare basis. The Guardian gave evidence to the court on that occasion supporting the order and was clear that such an order was in Lena's best interests at that time.".

61. It seems to me, having heard from Lena, having read the letter she wrote to me, but more importantly having heard what Lena has said to the Guardian, that I have to consider very, very carefully what I must refer to not just as a material change, but a fundamental change of circumstances. I have often been heard to say in this court – and there is nothing particularly original about it – that delay is the enemy of justice in most children cases. While I agree with what Ms Mitchell says, we are now three years on from the return order being made and I agree with her that the situation is now far more complex.

62. The criminal proceedings in respect of the father in Poland have bail conditions preventing contact between the father and Lena. There has never been a fact finding hearing in this jurisdiction. I have already referred to the almost impossible practical arrangements for Lena returning to the UK. She is a bright, articulate, 13 year old who has expressed the strongest views including a threat to kill herself. Now, I am not able to say whether that threat to kill herself was seriously intended but it is hard to think how an articulate, clever, 13 year old could make a frivolous threat to kill herself and I am not prepared to take the risk.

63. It seems to me that all of the matters that I have referred to: the impossibility of getting Lena here; the threat to kill herself; her settled status in Poland; her settled status at school; the fact that she cannot be with her father even if she does return to England against her wishes; and the ongoing sexual abuse allegations are all things which make it in my judgement almost impossible to see how Lena could be returned to the jurisdiction of England and Wales in a way that is compatible with her welfare. And, at the end of the day, I have decided that whether I apply the lower test or the higher test to which I have referred in this Judgment, I find that the threshold on either test is very clearly met and it would be unsafe for me to make an order returning Lena to the jurisdiction of England.

64. The Guardian has approached the case on a welfare basis for Lena and takes the clear view that making Lena return to England at this time, especially after having lived in Poland for such a considerable period, would not be in her interests. I go further than that. I would say that there is a really serious reason to believe that it would be detrimental and dangerous for Lena to be returned to England at this time and that it would be likely to cause her serious harm.

65. I have to take into account Lena's strongly held views, her age and understanding, her lack of connection with the UK, and the utterly unclear practical arrangements for any return. I cannot see that it could possibly be consistent with her welfare interests to be returned to England in these circumstances. I am mindful, in saying this, that there is a serious possibility - I make no findings - that the mother has alienated or continued to try and alienate Lena from her father and we will have to have a discussion when I finish giving this Judgment and the parties have had time to reflect on it, as to what are the next steps and where those next steps should take place. Because the father, so far as I am concerned, may be entirely innocent of the allegations of which he has been charged, and the mother may have set about a comprehensive programme of alienation to try her very best to make Lena want never to see her father again. I am very alive to that and to the dreadful risks that that poses to Lena, but as I so often say in this court, my job is very often to balance risk and I find it impossible to say that it would be appropriate for Lena to be forced to return in the

circumstances to which I have referred.

66. And therefore, I set aside the orders of Mr Gupta QC and of HHJ Nathan as the mother has requested.

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This transcript has been approved by the Judge