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Neutral Citation Number: [2024] EWHC 1309 (Fam)

Case No: FD23P00556

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2024

Before :

MS H MARKHAM KC

- -

Between :

FATHER **Applicant**

-and-

MOTHER **Respondent**

- -

Ms Anita Guha (instructed by **Messrs Goodmay Ray LLP**) for the **Applicant**
Mr Gary Crawley (instructed by GT Stewart Solicitors & Advocates) for the Respondent

Hearing dates: 29 February & 1 March 2024

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Approved Judgment

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This judgment was delivered in private [and a reporting restrictions order OR transparency order is in force]. 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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Ms H Markham KC:

Introduction

1. I am concerned in this matter with the interest of two children 'M' a boy born on 22.06.11 and therefore rising 13 years old and his younger sister 'A' a girl born on 31.08.17 and aged therefore 6 years and 7 months.

2. There is another sibling of this sibling group, a girl called 'J' born on 8.04.13 and aged therefore almost 11 years old. She, for reason I set out below, remains living in Nigeria in the care of her father.

3. The application before me is that of the applicant father ("the father") for a summary return of the children to their native country Nigeria. The mother ("the mother") opposes the application.

4. This matter was listed for me for 2 days on 29 February and 1 March 2024.

5. I delayed giving judgment until I had had clarification as to whether there were any ongoing/live criminal charges and/or complaints by the father against the mother. By email of 19 March 2024 from the father's English lawyer Mr Kevin Skinner I was sent a letter from the Nigerian police force setting out the current situation to which I refer later in this judgment.

6. The applicant father was represented by Ms Anita Guha (now King's Counsel) and Mr Gary Crawley. I am grateful to each of them for the pragmatic way each of them addressed and managed last-minute documents and updating information.

7. I heard oral evidence from Mr Oba Nsugbe KC, a family law specialist in Nigeria law and also from Kay Demery, a Cafcass Family Court advisor from the High Court team. Each of them had provided written advice and reports which I also have considered with care. I have received detailed written statements from the parties and numerous statements and documents, including judgments from the Nigerian proceedings relating to the children in Nigeria.

8. The case was case managed by Mrs Judd on 12 December 2023, and both at that hearing and the hearing before me, it was agreed between the parties, but I would hear no evidence from the parents themselves, but I would hear evidence from the single jointly instructed expert in family law, Mr Nsugbe KC, and from the Cafcass officer, Miss K Demery.

9. Before I set out the background to these proceedings, it is right that I set out the issues which I had to determine in order to ensure that I applied the right legal test to this application. On the mother's case by order of a Nigerian decision dated the 16th of January 2023 she said that, as the court in Nigeria had awarded custody of the three children of the family to her, she was able to relocate the children to this jurisdiction, even without the consent of the father. Father's position is that, whilst custody had been awarded to the mother, she did not have permission, and that decision did not give her permission to relocate the children to this jurisdiction without his knowledge and/or his consent. It is important that I determine as an initial decision whether or not I accept that this is a case of a lawful relocation and/or whether this is a case in which the children have been unlawfully removed from Nigeria to this jurisdiction. I had in mind the Court of Appeal decision of **Re R and Y (Children)** which sets out clear guidance as to the difference in approach to a lawful relocation as opposed to an unlawful removal.

10. I was also invited by the mother to make an order under **Hadkinson v Hadkinson [1952] 2 All ER 567**, as follows: "namely that the proceedings in this court are dismissed and the father be injuncted from bringing any new proceedings in this court until he has complied

with the order of 16th January 2023 and the child J is safely in the custody of the mother in England".

11. On 28 February I received an application, made on 27 February 2024, by the mother to adjourn this final hearing, the application being framed as follows: "the mother seeks to vacate the final hearing listed for 29 February 2024, until the date after the next appeal hearing on 8 April 2024. Until such time as the Court of Appeal motion about the father's appeal of the order of the 16th of January 2024. Any alternative the mother set out that she sought a Hadkinson order as referred to above. For clarification the appeal hearing which is referred to in the mother's application is in relation to the ongoing application by the father to appeal. The primary deci[si]on of the 16th of January 2023, that the children live with their mother in Nigeria. This is found as a decision that the mother has the custody of the children in Nigeria."

12. Pursuant to directions I had made at a pre-hearing review on 22 February, I was also sent, the day before the hearing, a small bundle of police disclosures arising from investigations by the English police force into altercations between the parents in this jurisdiction prior to the Nigerian custody decision in January 2023.

13. At 13:34 on 29 February, the first day of this hearing, (the morning, having been listed for my reading into the case), I received an email from the solicitors representing the mother appending some five documents relating to proceedings and orders arising from proceedings in Nigeria. No notice has been given to the father that I would be sent these documents, and I initially made it clear that I would not read them until I had heard submissions in relation to them, however, it later transpired that they had been forwarded by the father's team to the single joint expert and he had read them before giving his evidence and therefore to me that the proverbial cat was out of the bag and I ought to read them and no party objected to that. I have accordingly had regard to them in my assessment of the issues in this case.

14. The parties and their children are Nigerian nationals. Nigeria is of course not a Hague Convention signatory.

Matters in Nigeria before the decision of 16 January 2023

15. The parties married in Nigeria on 30 September 2010. They separated in October 2021.

16. The decree absolute was granted on 16 April 2023. The parties have been separated for over 2 ½ years time. As will be explored further below, the circumstances in which the mother and the children came to be in the UK remain unclear. As evidence, however, there are two significant factors which form part of my welfare and overarching analysis: those are that the mother was at some point in 2022 diagnosed with Hodgkin's Lymphoma and was receiving treatment here in England (she being present in this jurisdiction on a graduate visa). The second is the allegations by the mother that she had been the victim of domestic abuse by the father.

17. I note at the time of this application that the mother has lived permanently in the England, since the 4 October 2021, firstly on a student visa and then later a graduate visa. I note that the first time the children, or any one of them, travelled to the England was after the decision of the Nigerian court in January 2023. The mother accordingly accepts that she elected to travel alone to this jurisdiction and to leave the children in the care of their father or other trusted family members in Nigeria in October 2021, and from that period until she removed the children from him.

18. The mother has been enrolled at a London University campus to study computer science. It is the mother's case that she applied for visas for the children to travel with her when she first came over to the England, but that the applications were refused. I know that the father works remotely as a certified cycle security analysis and there is a great deal of dispute between the parents as to their version of events: as to agreement between them

regarding whether they would live together as a family in England if they were successful. I note, however, that the mother did not travel back to Nigeria until 29 December 2021, and there were significant periods of time when the children were cared for by either one of their parents. The father sets out that the mother has not explained why she elected not to remain in Nigeria in January 2022 but returned instead to the England. I noted that the mother was diagnosed with Hodgkin's Lymphoma in April 2022 but at that stage the mother had already travelled without the children to live in the England.

19. Others have described the chronology as confused and unclear, and I agree with that description.

20. The fact that the mother had removed the children from Port Harcourt, Rivers State – which is the state in Nigeria in which the family had lived together and where the children attended school – was addressed by the State Juvenile Court in March 2022 in proceedings commenced by the father that resulted in an order that the children would be located (they were in Lagos) and brought back to their family home in Port Harcourt This occurred in May 2022.

21. The father then petitioned for divorce in May 2022 and the mother cross-petitioned sometime later. On 12 May 2022, there is evidence that the father wrote to the British High Court Deputy High Commissioner in Lagos, requesting them to rescind any visas granted to the children to travel to the UK, upon the grounds that they were obtained without his consent or knowledge.

22. By June 2022 the parents had filed a certificate of reconciliation in the Nigerian courts. Matters moved on quickly and by 26 July 2022, the Nigerian courts granted an application for the children to remain living with their father. Mother was to be given access to the children. I have in the papers before me a document dated November 2022 which suggests that there was a complaint made by the father to the Deputy

Commissioner of police that the mother had applied for passports and visas for the children to travel to the England without his consent. The Commissioner of police in Port Harcourt it seems notified the Controlling General of Immigration Services that they were investigating this complaint.

23. Both parents submitted final evidence to the Nigerian courts in relation to both children matters and financial matters in December 2022. Final written addresses (submissions), (as they are called in Nigeria) were contained within the bundle before me.

24. On 16 January 2023 Assistant Chief Registrar, Patricia and Dr Victor – Nicole, granted a decree nisi and granted custody of all three children to the mother. The order also set out that the father shall have access to children in "reasonable access". The father was ordered to contribute to the school fees and, by way of divorce settlement, to pay to the mother 50% of the proceeds of the sale of some land that the family owned.

25. Contained within that judgment are a number of findings. Firstly, that mother's allegations of the father's adulterous behaviour were not proved. That whilst the mother initially enjoyed the support of the father to study in England but that relationship had broken down irretrievably. Lastly that the children were to live with their mother.

26. I confirm that I have read both final addresses of the parties and the summary of the evidence given by both parents and the judgment.

Events post-23 January 2023:

27. On 23 January 2023, the father lodged an appeal with the Court of Appeal in Nigeria against the custody order and against the order in respect of the proceeds of sale of land. The mother was served by WhatsApp on 24 January 2023. The father applied for a stay of the order for the children to remain in his custody pending the appeal. This stay was refused on 6 March 2023 and the respondent mother was ordered to ensure that the access

granted to the father was not denied and the applicant was ordered to comply with the order of 16 January.

28. On 10 July 2023, the father lodged his motion to amend the notice of appeal. On 23 February 2023, which was the day after the pre-hearing review on this matter before me, the mother lodged an application within the appeal process in Nigeria. There is notice for what appears to be a directions hearing on 8 April 2024 in relation to the appeal process. It was as a result of that hearing notice that the application to adjourn this hearing was made by the mother to me pending the outcome of that decision.

29. I considered the application to adjourn at the outset and gave a summary indication that I would not be adjourning a final hearing and set out that I would address that application and my reasons for it within the substantive judgement. It was clear to me, as I heard the application, that I would need to hear from the single joint expert before I could properly consider whether there was any merit in the application to adjourn.

30. It is important that I also highlight the chronology of events of the children's experience in Nigeria. I have already set out that the children spent periods of time when they were not cared for by either parent: the first time this led to the father's application in March 2022, which saw the children move from the care of the mother's friend back to their father's home, where they stayed until January 2023, when the mother removed the two subject children from their home with their father, pursuant to the custody order made by the Nigerian court. There had been earlier times in 2021 when the parents were in the UK that the children were also cared for by people other than their parents.

31. The children had been living with their father in River State from May 2022 until 21 January 2023, when the mother removed them from their father's care and caused the separation from their sister. I note that the children and their sister have not had any direct contact with each other since that separation on 21 January 2023. There was no contact whatsoever with their father or their sister until orders were made by Mrs Justice Judd in

December of last year. I have had no adequate explanation as to why the mother has not supported the children to have contact with their sibling, nor why she has had no contact with her daughter.

32. I note that following the removal of the children from the father's care in January 2023 the mother was arrested. She refused to provide details of the children's whereabouts and report back to the police later in March 2023. The mother failed to answer her bail. It is clear that the mother removed 'M' and 'A' to an unknown location to prevent the father from finding them. As a result, the children were removed, not only from their home life, but also from education. The mother has not provided any details as to the arrangement she made for the education in that period of time, and it was only during the course of this hearing that I was provided with some detail by the mother as to when the children actually engaged in education in England later in 2023.

33. The father notified the immigration services that the mother may try to leave the country but was reassured by the them that the children had been placed on the watchlist since 2022. On my analysis of the evidence, the children had been placed on that watchlist due to the father's reports to the police, and the police report to the immigration services of his fears of the children will be removed from Nigeria, and that the mother may try to fraudulently obtain passports for the children and apply for visas for them to live in the UK.

34. On the mother's case set out in her statement for these proceedings, she says that she removed 'M' from his home in Nigeria in March 2023 and left 'A' to be cared for by the maternal grandmother. There is some doubt as to the truth of this claim because both parties have agreed before me that at times the grandmother had lived in the United States of America. What is however clear on the evidence before me is that 'A' was therefore not in the care of her parents due to the decisions her mother made between March 2023 and August 2023, when she was collected by her mother and removed from Nigeria to this jurisdiction.

35. I note too that, during that five-month period, ‘A’ was being cared for in a location that I am not yet satisfied has been adequately explained to the court or to the father: separated therefore not only from her parents, but also from both her siblings, and it's unclear to me what contact she had with her mother and brother. I'm told by the father, and I accept, of the steps he took to try to locate the mother and his children following the events in January 2023. It was not until September 2023 that he was informed by a friend of the mother’s LinkedIn profile, showing her to be living in London, and he then took steps to begin these proceedings to ascertain the whereabouts of the mother and the children. The first hearing took place on 10 November 2023, when Ms Justice Russell made location, orders and orders for disclosure from the Department of Work and Pensions and NHS England, for the location of the children.

36. The father was told of their location on 17 November 2023. As I have already set out, the children had no contact with their father until further orders of this court in December 2023.

Domestic abuse:

37. The mother’s case contains allegations of domestic abuse. In her statement field within these proceedings, she sets out her accounts of some of the abuse she says she and the children, particularly ‘M’, suffered. The accounts in her statement are generalised but suggest that she was sexually harmed and beaten by her husband. She too states that her son was whipped all over for the smallest transgressions. The mother states in her statement that, were she to return to Nigeria, she would be killed by the father as he is a very violent person. The mother produced what can be categorised as an enduring non-molestation order against the father.

38. In her account to Ms Demery the mother spoke of the father physically beating ‘M’ with a belt. She stated that the physical abuse of her stopped after the birth of their second child ‘J’.

39. The father denies domestic abuse and beating his wife. He has accepted both to Ms Demery and to this court that he has chastised the children with reasonable force, as is common in the Nigerian culture, but, having read what his son told Ms Demery, he will not do this again.

40. Ms Demery records in her report that 'M' said this about his father:

41. He told me that "I miss my dad, but I don't want to talk to him or return to Nigeria because he beats me. It is only when I do something really wrong or when I annoy him. He uses a cane or belt; it was not often. I don't think my mum hit me. My little sister is too small to be beaten, and my middle sister has asthma. I think I was 7 years old when my dad first beat me". He told me that his mum would sometimes intervene and tell his father to stop. He said that beating is a cultural 'thing' in Nigeria as they do not want children to be spoilt.

42. There is nothing in the material arising in the Nigerian 'custody' proceedings as is contained within the bundle for these proceedings which sets out allegations of domestic abuse or physical harm to the children. These were not issues within that matter nor addressed in the judgment.

Arrival and stay in England

43. The children did not arrive at the same time: 'M' arrived first in March 2023, followed by A in August 2023. 'M' was granted entry clearance to the United Kingdom from 13 February 2023 until 31 December 2023. An application was submitted on 12 November 2023 for leave to remain as a dependant child, which is currently under consideration. 'A' was granted entry clearance as a student dependant child from 9 August 2023 until 31 December 2023. The letter from the Home Office suggests there are no pending applications in respect of her.

44. I was told during the hearing that ‘M’ started attending school here in England in May 2023 and ‘A’ in September 2023. The family were living together in one room until earlier this year. The children are Igbos but their first language is English. The mother has not been able to work due to her studies and illness and it is plain that, whilst the mother can work, she has no recourse to public funds. Her statement provides very little information about the children’s lives here and the detail is set out from ‘M’ in his discussions with Ms Demery.

45. ‘M’ spoke of his preference for English schools, saying that schools in Nigeria are much stricter and sometimes you are beaten there. He described himself as a proud Igbo and shared some of the traditions of Igbos with Ms Demery. He shares a room with his sister now, but he also did this in Nigeria. He was able to talk about his family in Nigeria and how he misses his sister ‘J’. He also shared his experiences of living away from both of his parents in 2022, and that he was left in Lagos with one of her mother’s friends who owned a school. He was here until his father came with the police in May 2022. He described being happy to see his father.

Mr Nsugbe KC

46. The court granted permission to the parties to instruct a joint expert, Mr Nsugbe KC, to report upon inter alia the following issues:

a. who holds parental rights for the children in Nigeria.

b. does a custody order remove the other parent’s parental rights.

c. does a custody order allow a parent to remove the child from Nigeria without the permission of the other parent and/or the court.

d. was the mother entitled to apply for passports without the consent of the father.

e. what protective measures are available for alleged victims of domestic abuse.

47. Mr Nsugbe KC has filed two reports in these proceedings: the first on 11 December 2023 and the other on 27 February, the week of the hearing. He was provided with the additional documents sent to me and to the father's team on the first day of the hearing. He had consideration of the documents appended to the mother's statements including the 'non-molestation' order.

48. His very clear view is that on his analysis of the Nigerian documents and judgment, it is his opinion that the mother was not permitted to make a unilateral decision to permanently remove the children from Nigeria to this jurisdiction. The expert confirms that a custody order does not automatically allow for the removal of the children from Nigeria to another country without the permission of the other parent, particularly where the court ordered that the father ought to have access to the children at reasonable times and that the mother "shall not deny the Petitioner this access".

49. As with this jurisdiction, in Nigeria married parents both have parental responsibility and are entitled to be consulted upon and provide consent to core matters relating to the upbringing of the children. I am told by Mr Nsugbe KC that:

> *Section 277 of the Child's Rights Act provides that parental responsibility means "all the rights, duties, powers, responsibilities, and authority which by law a parent of a child has in relation to the child and his property".*

50. He also advises that:

> *"The court will be familiar with the definition and concept of parental responsibility under the English law. In my opinion, the wording of the definition of parental responsibility under both Nigerian and English law is very similar, if not identical. Similarly the concept and practical application of what parental responsibility amounts to in any given set of circumstances is also very similar under both Nigerian and English law".*

51. A custody order does not, he advises, terminate the rights or responsibilities of the other parent.

52. Further, the expert advises that it was incumbent upon the mother to make an application to the Nigerian courts prior to the removal to seek to vary the terms of the January 2023 custody order to seek permission for the proposed relocation. Further, he is clear that the mother was not entitled to acquire Nigerian passports for the children in February 2022 without the father's knowledge or consent.

53. In relation to allegations of domestic abuse in Nigeria, Mr Nsugbe details the process a person can applied for protections within Nigerian law. In oral evidence, Mr Nsugbe was able to advise that non-molestation orders are often made in perpetuity as in the case of the order provided within this bundle.

54. In his oral evidence, Mr Crawley took Mr Nsugbe through the evidence and judgment of the Nigerian proceedings. It was put to him that there was evidence that the mother's plan was to have the children with her in London. A suggestion was made that the mother's address was plainly in London, but Mr Nsugbe noted both addresses had been used (England and Nigeria). Weight was placed on the fact that the father's case was that the mother had all relevant documents for the children to come to England. There was, Mr Crawley said, a plan.

55. Mr Nsugbe confirmed that we would need to look carefully at what was being agreed to by whom and in what circumstances. He was plain that any assessment of the evidence was a matter for me, and that he could not assist by speculating as to what the Nigeria Judge knew, or had in his mind, at the time of that judgment in January 2023. He did not resile from his clear view that, in his opinion, the mother ought to have made an application to take the children to live in England. In answer to questions from Ms Guha he informed me that he had read all the documents with care, but could see no reference to an application by the mother to remove the children from Nigeria to England. He looked to

whether the court had specifically addressed its mind to a permanent relocation and found nothing in the judgment that alluded to that point. I too, having read the judgment now several times, can see no reference to that application. He was clear to me that it was not an unusual step by a party to apply to the court for clarification and/or variation to enable a relocation.

56. As to the appeal process in Nigeria, he advised the court that the courts in Nigeria are overloaded, and one can expect an appeal to take between 18 months and 2 years. The 8 April hearing appeared to deal with an application (motion) and he could not speculate on what that was. I note of course that the mother made an application on 23 February 2024 and Mr Nsugbe KC could not rule out that the hearing related to that motion.

57. In relation to protective measures, Mr Nsugbe KC advised me that the Nigerian courts would not recognise undertaking given to the English courts and that the parties would need to make fresh application within the Nigerian system. It would not be a quick process, but if by consent it may speed things up. He noted the presence already of the non-molestation order but confirmed to me that that was linked to the Port Harcourt state only. If protection was needed in another state, then an application would need to be made there.

Ms Demery, Cafcass.

58. Ms Demery provided an insightful and helpful document setting out the children's lived experiences and their views about Nigeria. I have already set out some of this above. Ms Guha in her opening note summarised the key issues flowing from her report and I adopt them into this judgment:

- 'M' told Ms Demery that he is a proud Igbo and Nigerian. He spoke about his family in Nigeria including his two paternal grandmothers who live there. He referred to Nigeria as a great country;
- 'M' spoke about how he expected his sister 'J' to join him in England when he travelled here in 2023 and that he really misses his sister;

- 'M' has been told by his mother about her cancer diagnosis and is really worried about this as a result. In particular he referred to the emotional burden he has been allowed to carry as a result of how his mother has conveyed this information to him as he said that *"he was glad when she collected them as he had been so worried about her because of the cancer diagnosis"*
- 'M' stated he misses his father notwithstanding his allegations of physical chastisement;
- 'A' talked about how she loves her father and 'J' and how they are significant figures in her life. 'A' indicated that she wished her family could all be reunited and contradicted the suggestion that they were afraid of their father by saying that her father makes her laugh.

59. Cafcass had raised the issue in their report dated 20 February 2024 as to whether a fact-finding hearing is required in this case to determine the truth of the domestic abuse allegations levelled by the mother against the father. However, when giving evidence, Ms Demery did not pursue this with any force, and I note the previous case management decision of this court.

60. Ms Demery advised me that the children's wishes were not in her view's determinative: both expressing what she classed as a preference to remain here in London. Each however said that they missed various members of their family and importantly their father and sister. 'M' wanted to visit Nigeria and that there was a clear desire to visit there, but not to live there.

61. In relation to the physical abuse: Ms Demery qualified what she had written in her report, telling me that 'M' was matter-of-fact when he talked of the beating and that he qualified it as being a cultural thing; he joined it with school and physical chastisement and he used as an explanation that it was cultural. She recorded that he felt safer with his mother but also that he was worried for her, knowing of the cancer diagnosis. She did not know

whether he knew of the positive news from his mother about her prognosis.

62. In relation to 'A': she had an age-appropriate understanding about her circumstances and she too talked of missing her sister. She had referred to "our father beats our brother, and I don't want him to go back to that" but Ms Demery could not say that there was evidence that A had witnessed this or was reporting something she had heard being talked about.

63. She was clear to me that, in relation to staying in England, this was a preference telling me that the children were not saying anything specifically negative about Nigeria – they have formed a preference to be in England, and a major part of that was that they wanted to be with their mother. She told me how hard she had found it to discern from the chronologies who was caring for the children at various times and where their parents were. She expressed how confusing it must have been for the children. I noted that she told the court that it is plainly very hard for them that the family is separated. She talked of the loss of the father's role and the immense sadness in the family at being separated.

64. Ms Demery referred to the lack of certainty for the children's ability to remain living in this jurisdiction and the welfare needs they each had to be together with their sibling. She noted that the mother had rights of custody in Nigeria and, were the children to return to Nigeria, she supported the children living with her there while the appeal process continued.

The legal analysis

Summary return

65. Cobb J in **J v J (Return to Non-Hague Convention County) [2021] EWHC 2412**: set out the analysis of the legal principles:

> *"[34] It is clear law that the court in this jurisdiction will determine an application for a summary return of a child to a non-Hague Convention country by reference to the child's best interests. My attention has been drawn to what*

Lord Wilson (in Re NY at [30]) and Baroness Hale (in Re J at [26]) both described as the "classic" observations, the "locus classicus", of Buckley LJ in his judgment in Re L (Minors) (Wardship: Jurisdiction) [1974] 1 WLR 250, (obviously a pre-1980 Hague Convention decision but with evidently enduring relevance and standing).

"To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country."

[37] I was then taken to the current definitive statement of the law pronounced by the House of Lords in Re J (A Child) (Child Returned Abroad: Convention Rights) [2005] UKHL 40. I have extracted from the speech of Baroness Hale the following 11 key quotes which I have borne firmly in mind in reaching my conclusions:

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

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

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

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

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

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

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

viii) *"One important variable ... is the degree of connection of the child with each country. This is not to apply what has become the*

technical concept of habitual residence, but to ask in a common sense way with which country the child has the closer connection. What is his 'home' country? Factors such as his nationality, where he has lived for most of his life, his first language, his race or ethnicity, his religion, his culture, and his education so far will all come into this" [33];

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

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

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

Baroness Hale summarised her views:

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

[38] I was then taken to Re NY (A Child) [2019] UKSC 49, a case in which the Supreme Court set aside an order made by the Court of Appeal under the court's inherent jurisdiction in what are accepted to be very different circumstances to those obtaining here. Mr Khan argued that I should give (as the judgment suggests) "some consideration" ([55]) to the eight linked questions posed by Lord Wilson in that case:

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

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

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

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

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

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

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

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

Poole J in Re A & B who adopted this analysis of the law went on to say that:

> *"I would only add the remainder of [39] of the judgment of Baroness Hale in Re J,*
>
> *"If those courts have not choice but to do as the father wishes, so that the mother cannot ask them to decide with an open mind, whether the child will be better off living here or there, then our courts must ask themselves whether it will be in the interests of the child to enable that dispute to be heard. The absence of a relocation jurisdiction must do more than give the judge pause ... it may be a decisive factor. On the other hand, if it appears that the mother would not be able to make a good case for relocation, that factor might not be decisive. There are also bound to be many cases where the connection of the child and all the family with the other country is so strong that any difference between the legal systems here and there should carry little weight."*

68. The Court of Appeal upheld the decision of Poole J in *Re A and another (children) (return order: UAE) C v D [2022] EWHC 2120 (Fam)* that a fact-finding hearing was *not* necessary to determine the truth of disputed domestic abuse allegations in analogous circumstances to this case in *Re A and B (Children) (Summary-Return: Non-Convention*

State) [2023] 1 FLR 1229. The applicant mother relied heavily upon allegations of domestic abuse said to have been perpetrated by the respondent father against both the mother and the subject children in arguing that it would not be safe or in the children's best interests to return to Dubai. The Court of Appeal held as follows:

> ***"[71]*** *In my view, there is no need for further guidance because Re J and Re NY contain the relevant, and sufficient, guidance to the court for the purposes of determining an application for the return of a child to a non-Convention State. It is a welfare determination in respect of which an array of factors will be relevant and which the court must balance when determining what order to make. As Lord Wilson said in Re NY, part of that exercise will include the court determining, in respect of all relevant matters, but in particular in respect of the matters set out in s 1(3) of the CA 1989 and any allegations of domestic abuse, whether, in order sufficiently to identify what the child's welfare requires, the court should conduct an inquiry into any or all of those matters and, if so, how extensive that inquiry should be.*
>
> ***[72]*** *I would, therefore, reject Mr Setright's submission that the court was required to undertake a fact-finding hearing, or further investigation, into the mother's allegations of domestic abuse before making a return order. Neither the absence of any fact-finding inquiry in respect of the mother's allegations by the Dubai courts nor the fact that those allegations would not be relevant in any child proceedings in Dubai meant that the English court must undertake such an inquiry before determining whether to make a return order. As in all welfare decisions, the extent of the court's inquiry and the court's determination of what order to make will depend on the facts of the particular case. As Baroness Hale said in Re J (at para [37]), in respect of 'different legal conceptions of welfare': 'Like everything else, the extent to which it is relevant that the legal system of the other country is different from our own depends upon the facts of the particular case ...' (my emphasis)*

__[73]__ The judge plainly had a discretion both as to the extent of the welfare inquiry and as to whether to make a return order. Mr Setright has to establish that, in either respect, the exercise by the judge of his discretion was flawed in some material respect.

__[74]__ The principal issues in this case are, therefore: (a) whether the judge failed properly to follow the guidance referred to above and/or PD 12J; and (b) whether, for that or for any of the other reasons advanced on behalf of the mother, the judge's welfare decision was flawed.

__[75]__ (a) The first question is whether, to adapt what Lord Wilson said in Re NY (at para [59]), Poole J's 'approach to the mother's allegations [was] sufficient'. Did he sufficiently consider whether, 'in the light of Practice Direction 12J, an inquiry should be conducted into the disputed allegations made by the mother of domestic abuse' and was he wrong to decide that no additional inquiry was required to enable him fairly and properly to determine whether a return order was in the children's best interests.

__[76]__ In my view, the judge was entitled to decide that he could fairly and properly determine whether to make a return order after a summary welfare assessment. He had a significant amount of material available to him and was entitled to decide that he did not have to undertake a fact-finding hearing or any further investigation into the mother's allegations. He was very well aware of the nature of those allegations and there is nothing which would support the conclusion that he failed to give them proper weight when making his decision."

69. In *A and B*, Poole J was assisted by expert evidence from the legal expert, Diana Hamade in respect of various issues including the availability of protective measures and the availability of a relocation jurisdiction. In circumstances where it was accepted by the court that the respondent in this case did not have the remedy available to her of pursuing

a relocation application, it was determined that this factor did not militate against an order for summary return being made. The Court of Appeal upheld this decision.

70. If I find that the mother lawfully relocated the children to this jurisdiction, I am guided by the Court of Appeal decision in **Re R and Y (Children) [2024] EWCA Civ 131**

The parents' evidence

71. I have before me statement prepared by both of the parties: the applicant father having prepared three statements, the last one at my direction following the PTR. The mother filed two statements, again following a direction I made on 22 February 2024 at the PTR and this to address her cancer diagnosis and updated as to her prognosis.

72. The father's statement of 23 February was to set out what, if any, undertakings he was prepared to give to this court and as assurances to the mother of his behaviour were she and the children to return to Nigeria. I set them out in full:

"To assist with the children's return I offer the following undertakings:

a. not to initiate any civil or criminal proceedings arising from the children's removal from the jurisdiction of Nigeria.

b. I will fund the cost of return flights for the mother, 'M' and 'A' to Nigeria.

c. I will not attend the airport on their return to Nigeria.

d. I will not remove 'M' and 'A' from Mitchelle's care before any decision is made through the Nigerian courts. The court in Nigeria has already made decisions in respect of the children: those orders remain in force. I will not

challenge those further aside from the appeal which is currently being heard by the courts.

e. Whilst I would love to see and spend time with the children as soon as possible, once they have been returned, I will seek contact with them through the Nigerian courts, or through mediation/negotiation with the mother.

f. I agree to pay global maintenance to the mother, so that she can find suitable accommodation in Nigeria and meet her and the children's needs for a period of three months. The maintenance would be around 150,000 Nigerian Naira per month. This is not withstanding the orders already made in Nigeria in this regard.

g. As I have set out in above, I have reflected on my previous parenting of the children and will not use any physical chastisement towards the children again. I expect the same from the mother.

74. He also gave specific undertaking set out as non-molestation undertakings in respect to the mother:

Whilst I do not accept that I have been violent towards the mother, I will offer the following undertakings:

a. Not to harass, pester or be violent towards the mother.

b. I will not encourage any other person to do so.

c. I will not go within 100 metres of any address where the mother lives, without prior agreement.

75. The mother’s most recent statement updated the court in relation to her cancer, and she provided letters from N S, a clinical nurse specialist of Guy’s Hospital. I am pleased to read that the mother is recovering from her cancer treatment and that her doctors have no major concerns for her health. I am told that the mother is making a full recovery, and she has been a post-cancer patient for two years now. There are no scheduled repeat scans in place, as the likelihood of recurrence has been deemed low by her medical team. She goes on to say that she understands that 65% of people diagnosed with grade 4 will live for more than five years. I am told that the mother does have a further appointment in May of this year, to which she refers in her statement and at that time she would be likely be officially discharged from ongoing care. The mother in that statement also advised the court for the first time as to the support in this jurisdiction she would derive from her sister who lives in South London, around 30 to 40 minutes from the mother’s a current residence, and I'm told that she has a British passport. I'm also told in that statement that the mother’s brother lives in Norwich, over three hours from London, and he also has lived in the UK for some time now. She provided no evidence as to how she would manage the children’s contact with their sister and father, nor proposal for taking the children to visit Nigeria.

The parents’ cases & submissions

76. In reading the statements from the parents, I also note that I have had provided to me within this bundle many of the documents that the parents relied upon within the Nigerian proceedings. In those documents I have, the notice of petition, responses from both of the parties, their final written addresses to the court, and then the summary of the proceedings and evidence and the judgment. That final judgement summarises much of the parties’ oral evidence, and assessment of the facts. I have already outlined the findings made within those proceedings.

77. The father's case is that the mother unlawfully removed the children from Nigeria and there was no provision in the judgment or decision of the Nigerian court in January 2023 that permitted her to relocate away from Nigeria with any of the three children. He further submits that the mother's decision to relocate to England to study caused a fracture to the family unit.

78. The father says to me that the children have suffered huge upheaval, harm and disruption as a result in England in 2023. He says that he prioritised the children's needs by remaining in Nigeria in 2023 to achieve a resolution in the Nigerian courts of the arrangements in respect of the children's living arrangements. The father emphasised that the mother and children remain living in this jurisdiction with no long-term security. The father placed some weight on the fact that the mother had presented no evidence indicating that the children were integrated here and that they have settled in their lives in England. He points me to the Cafcass enquiries which have confirmed that the mother self-referred to children services requesting help and that she was struggling with her current housing. The mother was referred to the 'no recourse to public funds team', demonstrating, the father says, that the mother has struggled to support the children; he further submits to me that there was no evidence that the situation had altered or improved for the children. He flags the very serious concern he has had about where the children were living and what their life looked like here.

79. The father sets out that the children have no right to remain here. He is clear that the assessment of the evidence is that it is overwhelming in the best interest of the subject children to be returned to Nigeria, to facilitate the necessary welfare determination within the Nigerian courts. He finally submits that the mother has prioritised her desire to migrate over her children's needs to return to Nigeria, to enable the siblings to be reunited and to be reintegrated to the home country with extended family.

80. In the court the father pointed out to me that the question in particular of any abuse against the children did not feature in the written statements and all evidence given by the parents in the matrimonial proceedings in Nigeria. He accepts that he has used reasonable chastisement, it being part of the culture and, as I have set out above, he has given a number of assurances to me that he will not set out to harm or criminalise the mother were she to return to Nigeria.

81. I have also been sent a letter confirming that there are no ongoing criminal investigations into the mother's conduct, the police being of the view that it is a matter for the family courts.

82. The mother's case has several planks. Firstly, it is her case that the decision in the Nigerian courts awarding to her of custody of all three children gave her the permission to remove the children from Nigeria to live. Mr Crawley, who took me to the parts of the mother's statement and evidence within the Nigerian proceedings in which the discussion around the relocation to England was debated, pointed out to me that the mother gave her addresses as her home within those proceedings: one being in Nigeria and one being in England. He points within the judgment and summary of proceedings of reference to living in London, and that there was reference to the father having a visa which meant he could visit the children in England. I note too that the father's written address advises the court "not to be swayed to grant custody to the respondent based on her bogus claims of taking them to England and having gotten them a scholarship without any evidence to this."

83. He says that I should dismiss the father's application as the mother plainly lawfully removed the children from Nigeria to this jurisdiction within her custody order.

84. At the same time, however, the mother invited me to adjourn proceedings due to the ongoing appeal process in Nigeria. Mr Crawley for the mother invited me to make a Hadkinson order, namely that the proceedings in this court are dismissed and the father be injuncted from bringing any new proceedings in this court until he has complied with the order of 16 January 2023 and the child 'J' is safely in the custody of the mother in England.

85. Mr Crawley submits to me that the judgement of the Principal Registrar on 16th January 2023 makes it crystal clear that the Judge knew of the plans and applications to take the children to England, as they are mentioned in the judgment, and Mr Crawley advises me that the mother continues to seek the return of the child 'J' to her care in accordance with the Nigerian order 16 January 2023. His position is that the father has consented for children be in England. He reminds me that, in April 2021, the mother applied for a visa to study for three years as an undergraduate, and for her children and husband to join her. The father provided a letter of consent for his children to apply for a 'dependent visa' to travel with his wife on 22 September 2021. The application for the children to join the mother in England was held up. I am told that, on 3 November 2021, the father was granted a visa to enter England freely until 31 December 2023 and it is submitted to me that shortly thereafter the father did indeed come to England and stayed with a family friend who was at that time living in Northampton. It is plainly the mother's case there was express consent of the Nigerian court for the children to be removed from Nigeria to live with their mother in England whilst she was studying here. Further it is submitted to me by Mr Crawley that I can find that implicit consent from the cross-examination of the mother, that it says in the documentation that on 30 November 2022 the father knew that she had every intention of taking all three children in England in January 2023. He refers me to the part of the documentation where the learned Judge in Nigerian notes that the mother had all necessary documents to remove the children from Nigeria to England.

86. In relation to welfare: The mother's case is placed on the concerns the children have about her health and that the three children should be together in her care. She submits that "Clearly the father has a propensity to violence both to the mother and the children. Not

only on the comments of the children to the Cafcass officer, but also the injunction made against him"

87. Her clear submission is that it would not be safe for either 'M' or 'A' to be subject to any form of summary return to Nigeria.

88. The mother places reliance on the fact that the court in Nigeria made a far-reaching non-molestation order (made first on 22 December 2022) against the father due to the actions he instigated at the court building on 4 November 2022, when it was alleged that the life of the mother was in imminent danger. The mother submits that, given the danger to the life of the mother, it would be exceptionally inappropriate to use the summary return provisions in relation to these children. This injunction appears to have been made in perpetuity at paragraph (b).

89. The mother submits that it follows therefore that the court in England & Wales must conclude that the violence visited by the father to the mother on 4 November 2022 was such that the court in Nigeria made a far-reaching injunction against him on 22 December 2022, and that the risk to the life of the mother from the father was sufficient to cause the order made. This is therefore a fact already found by a competent tribunal (the court in Nigeria). The risk of harm from the father to the children and their mother Section 1(3)(e) Children Act 1989 is at the extreme level given that it is a threat to life.

Conclusions:

90. The first matter I must determine is whether the mother had a lawful right to remove the children from Nigeria to live in this jurisdiction.

91. I have had regard to the totality of evidence in relation to this, which includes a close reading of the material within the Nigerian proceedings. I do accept that there is oblique reference to the children being in England, but there is nothing in the mother's written case or in the summary of the evidence which makes it plain that the mother's case was predicated upon her caring for the children in England.

92. The judgment which makes a number of findings makes no reference at all to the children being removed from Nigeria to live in London.

93. There is a clear dispute as to whether the father had provided his consent to the relocation and indeed as to whether he had agreed to the mother obtaining visas for the children. The evidence that the father took steps to place the children's names on a watchlist, which I accept he did, lends weight to his arguments that he did not consent to their removal at the operative time, regardless of any earlier joint family decision. I concur with the views of Mr Nsugbe KC that one needs to look at the situation in January 2023 and the disputes between the parents. I looked too for evidence from the mother as to what plans she had to care for the children in England: where they would live, what schools they would go to etc. There was none, save as to the reference by the father's lawyer in written closing submissions, that the court should not be taken in by the mother's reference to having obtained scholarships for the children.

94. I rely too on the mother's actions post-January 2023, when she took two of the children from their home and essentially went into hiding. She did not communicate with the father and did not abide by the court order that there be reasonable contact between the children and their father. I have asked myself the question why the mother would act in this way and fail to ensure that she abided by the court order if she was clear in her mind that the decision had permitted her to remove the children to Nigeria. I question to why she did not answer police bail and why she took no steps to secure 'J's move to her care under the custody order. I form the very clear view and find that the mother knew that she did not have permission to remove the children to England and acted in a clandestine way and one which breached the Nigerian court order for reasonable contact between the children.

95. I find too that there was and remains no evidence that the mother had solid plans for the children upon their arrival to this country and this is demonstrated through the lack of preparations for a home, education and for the children to travel together with her.

96. Having reached that conclusion, I therefore direct myself to the law as set out in detail above when assessing and considering whether or not to order the summary return of the children to Nigeria.

97. The children's welfare is my paramount consideration and I have regard to the welfare checklist at s.1(3) of the Children Act 1989. I have to decide whether to order summary return or whether a welfare enquiry and assessment should be made whilst the children remain in this jurisdiction. Such an enquiry would likely take many months, and, in this matter, there are already ongoing proceedings relating to the welfare of the children in Nigeria in which both parents currently engage.

98. The salient features are that:

a. The children are part of a sibling group of three and have been separated since January 2023.

b. The children are Nigerian and lived there until they were brought to this jurisdiction in March 2023 and August 2023. 'M' describes himself as a proud Igbu and speaks of his links to his country and traditions. Both he and his sister speak of missing Nigeria and family there. It is plain that both 'A' and 'M' in particular - have strong ties to their home country and to the traditions and lives there.

c. The children have no current rights to remain in this jurisdiction.

d. The children have a home, a small flat and share a room and only recently moved there; no evidence was provided to me about this and the stability of this.

99. I note that the mother had to seek support via the no recourse to public funds team at the local social services and I have no evidence at all from her as to her ability to meet the family needs here.

100. The children have had no contact with their sister, father and other family members between January 2023 and an order of this court in December 2023. There has been no explanation from the mother as to why she did not support this. Whilst reliance is placed on fear of the father, the mother and children were living here in England and steps could have been taken to protect the mother were this needed.

101. The mother has provided no plans to the court as to how the children's relationships with their sister and father (and wider family in Nigeria) will be supported if they remain living in this jurisdiction.

102. There are ongoing proceedings focused on the interests of the children in Nigeria. Both parents actively engage in them and the mother as recently as 23 February 2024 field a motion in those ongoing proceedings. Curiously the mother invites me to allow the children to remain here, but that the mother should be injuncted from making any application in this jurisdiction and allow the Nigeria process to continue.

103. The domestic abuse allegations appear to have taken more shape within the context of this application for a summary return of the children to Nigeria. It is of note that there are no such allegations made within the Nigerian proceedings and in particular not in relation to risks of harm to the children. I caution myself in relation to placing too much weight on this, as cultural issues have been flagged by the father and 'M', which may be necessary to understand. However, it is a fact that no allegations of risk of harm were made in those proceedings. Against this I do have regard to the non-molestation injunction the mother has against the father, and that the mother plainly established a need for this for his order to be made. I note that in those documents the mother's account

of the abuse she suffered is not detailed no is it in her statement within these proceedings save as in generalised terms and that she did not invite me to make findings about these.

104. I do not find that it is necessary for me to make findings about the allegations of domestic abuse in order to form a view on the main application for a summary return. I note the comments made by the children to Ms Demery, and that 'M' framed his being beaten within a cultural context along with being beaten at school. I note that he is clear he misses his father and wishes to see him. I note too that he also said how pleased he was to see his father in May 2022. The mother's allegations of risk of death and she is in fear of her life do not bear scrutiny, not least when she has taken steps historically to protect herself and felt well able to stand up to the father on that occasion and in the custody proceedings.

105. Ms Demery spoke of the immense sadness the children have in being separated from their sister and father. They love their mother and want to live with her: they worry about her but miss their family too. They prefer to be here but miss Nigeria. There is no strong feeling that they would be unsafe were they to return to Nigeria.

106. The mother has not told the court whether she would return to live with the children were they to return to Nigeria. It is plain to me that the mother has support in her home country were she to do so. She plainly was supported by family and/or friends when she remained there between January and March 2023 and has left her children at various times with trusted people. She has access to legal advice and can take steps to protect herself were she to have that need.

107. The mother has one appointment with her treating team in May: she provided nothing to say that this could not be carried out via Zoom, or that it could be brought forward if necessary. I am sure that, were the need to arise, the mother could travel back alone to see her treating team. The mother provided the court with no information as to what she

would do in the event of a summary return. Her evidence on this, as with much of her case, was scant.

108. I accept that an order that the children should return to Nigeria would be contrary to the mother's wishes, but I have clear evidence from Mr Nsugba KC that it is open to the mother to apply to vary the custody order, or to clarify it and seek permission to relocate with the children to the UK. I am unclear why the mother has taken no steps to clarify this in the time which has elapsed thus far.

109. I have given careful regard to the father's assurances to this court as to the respect he will afford the mother were she to return to Nigeria. He tells me that he will abide by the court order in place in Nigeria which provides that the children live with their mother. There may need to be some care taken with the views of 'J;, who has been cared for alone by her father for over a year now. I am fortified by the protection the mother already has in place and the evidence of Mr Nsugba KC that other orders can be sought by consent and that they might be provided sooner if by consent. As already stated, the mother is represented already in the ongoing children proceedings and has access to legal advice. Lastly, I now have confirmation that there are no ongoing criminal proceedings in Nigeria by the father against the mother.

110. In my welfare evaluation I must have regard to the welfare checklist under s.1(3) Children Act 1989. I must have regard to all the circumstances including, in respect of each child,

a. the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

b. his physical, emotional and educational needs;

c. the likely effect on him of any change in his circumstances;

d. his age, sex, background and any characteristics of his which the court considers relevant;

e. any harm which he has suffered or is at risk of suffering;

f. how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

g. the range of powers available to the court under this Act in the proceedings in question.

111. The factors I set out above feed into this welfare analysis. I have given careful consideration to the wishes and feelings of the children and their expressed preference to remain in England. I agree with the assessment of Ms Demery that this is just a preference and that I must balance that against the wider issues in this case.

112. The children would, in my judgment, derive a great benefit from being closer to their wider family; noting that, in this jurisdiction, they have a maternal aunt and uncle, but I heard very little, if anything, about relationships between the children and them. The children require stability and the opportunity to have secure and healthy relationships with both of their parents. They have no particular physical needs, but they do need to have a consistent education and stability in their education, which to date I find has been lacking. The children have a strong and clearly-expressed link to their Nigerian roots and culture. 'M' was proud to be Igbu and expressed a clear wish to return to Nigeria, if only to visit people he misses there. A return to Nigeria would bring some stability, in particular with regard to the ongoing uncertainty of their visa status here in England. I find that the children's clear preference is to live with their mother, and this is the current legal status of the order in Nigeria. The mother can make a decision to care for her children in Nigeria under that order. I find that the risk of harm of the ongoing separation from their father and sister is greater than any risk of harm which the children may be exposed to by an order that they return to Nigeria. Living in this jurisdiction, the mother has struggled financially and has provided no evidence to me to assure the court, and indeed the father, that she is able to remedy that and meet the children's needs. Against this the father is financially comfortable and there are orders in place that he assist the mother financially.

113. Taking the allegations of physical abuse at their highest, I do find that a continued use of the type of beating mother and son described would place 'M' at risk. However, I balance against this the lack of reference to concerns of physical abuse by the mother in the Nigerian proceedings and the assurances the father gives not to behave in this way again. I note too and find that N was clear that, whilst he did not want his father to beat him in that way, he was not scared of his father, missed him and wanted to see him.

114. I find that both parents have in the past behaved in ways which have failed to place the children's need for stable and secure care at the fore of their decisions. Each in their own way has added to the inconsistencies and changes the children have experienced which has been harmful to them.

115. I have had regard to the factors which might mitigate against a summary return: these include the children's preference to remain here, the mother's possible need to access treatment, the presence of maternal family members and the stability the children have found in their schools, which each appear to enjoy. I have heard little – save, though, the voice of 'M' as to his connections here, and note that these are recent in the making ('M' only having been at school since May 2023 and moving to a new home in recent weeks). I have given careful thought to the mother's allegations of domestic abuse and her assertions that she would be at serious risk from the father were she return to Nigeria. I am fortified by not only the assurances the father has given to me, but also the fact that the mother has in place a protective order and that, with the father's consent, which he has given to me, she could obtain another protective order in the federal court rather than the state court.

116. I find that the relationships between the siblings is a core and important factor in balancing all competing factors. There was no evidence that the mother was prepared to take the children back to Nigeria: notwithstanding that they so very much want to see their sister. I find that mother only enabled contact to take place once ordered by the court. It was a particular feature of this case that there were and are no proposals for

contact and links to Nigeria. The longer the children remain in this jurisdiction away from their home country the more they would become connected to this jurisdiction and the harder it will be for them to leave in circumstances when neither currently have a visa to remain here.

117. I accept the evidence of Mr Nsugbe KC that the mother can apply to vary the current custody order to clarify where the children might live when in her custody. I have already expressed surprise that she has not commenced that clarification. I accept that there is a clear legal process in Nigeria within which the mother can seek permission to relocate the children to this jurisdiction, within which her ability to meet their needs and retain connections with their father and wider family will be assessed and tested. I am mindful too that both parents have throughout continued to engage in ongoing proceedings in Nigeria tasked with assessing the welfare of the children. Weighing all of the evidence and considerations together, it is in my judgment in the best interests of both children to be returned to Nigeria.

118. In order to protect the interest of the children and to ensure the stability of their return to Nigeria I make the following conditions:

119. The father must through those he represents in Nigeria formally write to the mother's legal team to set out the assurances he has given to me and as set out above in this judgment. He must ensure that undertakings not to behave as he has promised not to do (and without prejudice to any admissions as to the same) are clearly set out in that correspondence.

120. The father must pay to the mother the maintenance he assures me he will provide to the mother <u>before</u> she leaves the UK and provide the costs for the flights back to Nigeria for mother and both children.

121. In the event that the mother requires deposits for housing he must pay those monies to those he instructs in Nigeria to hold securely for the mother when required.

122. The father must in a letter from those he instructs in Nigeria to the mother, confirm that he will seek contact through the courts, via mediation and or via solicitors in Nigeria and that he will not seek to remove the children from the mother's care save as through the Nigerian courts and the current appeal process.

123. The mother must provide assurances that she will facilitate contact between the children and their sister and father when in Nigeria and within 14 days of their return there.

124. The father and mother must provide those assurances within 7 days from Tuesday 2 April 2024 (having regard to the forthcoming Easter break) save in circumstances where the mother is going to attend court in Nigeria on 8 April then they must be provided by 5 April 2024. The assurances the parents gives to this court must be disclosed to the Appeal Court in Nigeria and the parents shall provide confirmation that they have done so (noting the hearing on 8 April 2024).

125. In the event that the mother is to return to Nigeria for the hearing on the 8th April 2024, all assurances must be with this court and the Nigerian courts by 5 April 2024 and the children must return with their mother to Nigeria.

126. I do not know when the school term starts after Easter, but all efforts must be made for the children to travel to Nigeria to start the new term. If not they must be in Nigeria by no later than Saturday 13 April 2024. That is 2 weeks. This will allow time for the children to say goodbye to family and friends and plan for their return home. I consider this to be a proportionate, but I will consider any discrete application or submissions on this date.

Addendum to this judgment:

127. I sent out this judgment to all parties on 27 March 2024, in draft subject to any typographical errors and invited requests for clarification to be made promptly too. I permitted the sharing of the judgment with the lay parties so that the steps I set out could be actioned promptly and provided for any discrete application or submissions to be made to me. I recognise that the judgment was sent out to the parties and their legal teams

on late on 27 March so was not seen until the next working day which was Maundy Thursday, and this may have impacted on some of the timing and response to the steps that needed to be engaged with as I note some of the parties' legal teams were away for the Easter break.

128. On 3rd April I received, from Mr Skinner, solicitor representing the father a draft judgment amended in relation to typographical errors and in an anonymised form, along with a draft order and a document setting out his client's undertakings to this court. I note that Mr Skinner has sent several emails to Mr Hepplewhite asking him to engage in the work on the draft judgment and in agreeing an order. I do not believe that Mr Skinner received any response and on 4 April at 17.03 I received the following email from Mr Hepplewhite:

> Dear Judge,
>
> We apologise for writing to you directly.
>
> We confirm our office intended to provide the flight itinerary by 4:00pm, however, we required our client further instructions in relation to the draft order and the changes that may be required.
>
> Our office has been provided with a flight itinerary (as **attached**) and will revert to the Father's solicitor with a substantive response to contents of the draft order.
>
> We apologise for any unforeseen delays and our office is using our best endeavours to obtain our client's instructions following the Easter closures.

129. I responded early the next morning (10am) and asked for a full update from the mother's team by 4pm that day (4th April). Mr Hepplewhite emailed to invite me to extend that time to the morning of 5th April as his counsel was engaged in other matters. I was going to grant that, but by the end of the day on 4th April I received a C2 application on behalf of the mother with a statement in support seeking a listing of the matter for (and I quote from the C2) to list for further hearing to address draft order contents.

130. The application was supported by a short statement from the mother (which I address further below)

Given you invited representations as to implementation however, we propose that a short directions appointment should be fixed in accordance with the **attached** C2 and supporting statement. Our client has particular concerns regarding:

1. A mirror order in Nigeria to reflect the terms of the injunction contained within the order and to ensure her safety in the event of return.
2. Provision for the return of J to her care in Nigeria in light of the order of the Nigerian Court dated 16th January 2023.
3. The Respondent has additional concerns regarding the level of maintenance and the timing of the return .

If the above matters cannot be resolved we are instructed that she will wish to appeal.

131. Those documents were served on the father as they were sent to me. I indicated that as I was sitting in the week of 8th April, I could accommodate a hearing and I offered two possible times for the matter to be listed. Those times were not mutually convenient to trial counsel and on that basis, having been invited to deal with the matter on submissions I determined that was the best way forward. In that email I also directed that if any party wished to raise any clarification on the substantive judgment they were to be sent to me by 4pm on 9 April 2024. I have received no such request.

Summary of the mother's position:

132. By way of a sworn statement appended to the C2 the mother set out her rational for inviting me to amend the draft order. Her statement is short and the issues she raised on that statement are important to set out in full:

On 4th April 2024, I instructed my solicitors to respond to the Father's draft order and amendments that would need to be included, namely:

a. Undertakings: In accordance with KC Nsugbe's expert evidence, the undertakings provided by F would need to be made into a mirrored order in the Nigerian Federal Court to provide the necessary assurances and safety upon my return to Nigeria with the subject children.

b. As I understand it, the current undertakings provided by the father's Nigerian solicitors are not legally binding or enforceable as they remain undertakings relating

to these proceedings. I am fearful for my life without the necessary protection and any influence the father has with the Port Harcourt police.

c. *Maintenance: The father has offered to provide 450,000 Nigeria Naira over three months towards accommodation and living costs for myself in the children. This is insufficient as three bedroom apartments cost 4,500,000 Naira per annum and it is customary to pay annually rather than monthly. I have also been unemployed for some time due to my cancer treatment and the stress of these proceedings and will not have the luxury of having a job to easily walk into in Nigeria.*

d. *School Fees: Under the Nigerian Order dated 16th January 2023, the father is required to meet the children's school fees. At present, I have not found any schools that will immediately enrol the children mid-term. I have proposed to the father that the children complete their semester here before the summer break as this will tie in with the Nigerian school holidays and ensure the children do not miss any education.*

e. *Nigerian Appeal proceedings: I have proposed to the father to postpone the summary return of the children to the school break for summer holidays due to my Nigerian solicitors informing me that the appeal proceedings have been adjourned to 11th July 2024.*

f. *My Nigerian solicitors have informed me that I will not be able to make any application for the children to be relocated to the UK until the substantive appeal has been dealt with and it is unlikely that will happen on 11th July.*

g. *Return of J: The current draft order or undertaking does not include any provision for having J returned to my care.*

I would also like to address that the current draft does not include any provision for both parties to disclose their address. As contact will be occurring between the children and the father, I would propose both our addresses are disclosed to each other should their be an emergencies (medical or otherwise).

133. This was a position sent to the father's team and they, like I understood this to be the mother's case and rational for changes to be made to the draft order.

134. Upon receipt of the written submission from the mother I was somewhat surprised to note that new (and evidentially new) matters were further being relied upon and that the mother's case and submissions to me were again changing. In that short document I am invited to delay the date by which the children return to Nigeria and significantly so, until September 2024. The mother relies on, it seems four core reasons for this:

  a. That I linked the prompt return date to the understanding that there as a hearing in Nigeria on 8 April and I expected the mother to attend

  b. The children's welfare dictates that they should finish this academic year here in this jurisdiction.

  c. Thirdly that there are a number of outstanding issues which require resolution pending a return.

135. I was also told that:

The mother underwent a medical appointment on 6 February 2024. As a result of that appointment, on 15 March 2024, a meeting was held which was reaffirmed on 21 March 2024 by way of letter, confirming the mother had an abnormality and cell changes had potentially been discovered. The mother has been invited to undergo furthermore determinative invasive tests and a waiting period to evaluate any further changes.

136. I pause here to note that when I enquired in the substantive hearing about updating medical information related to the mother's cancer and health, I was not told about the recent appointment nor was I at any stage, nor have I been to date provided with evidence to support this statement. In fact, I was told the opposite, that there were no contrary indicators, and the mother had another appointment in May which was just a 'check-up'. I also had a letter from the mother's team which gave a wholly contrary view as to the mother's health.

137. The written submissions go on to confirm that in light of this health update the mother will not return to Nigeria and as a consequence of this a further matter which the mother invites me to determine before the children leave this jurisdiction is the implementation of orders for contact between the children and her once they are back living (it seems on a conceded point) with their father. The mother would agree to mirror orders being in place in this jurisdiction to mirror ‘contact’ orders which she would seek to have made in Nigeria. The mother’s case as articulated in this document appears to have shifted significantly to a position where the children will live with their father in Nigeria and spend their school holidays in this jurisdiction with their mother. The mother essentially submits that I should not allow a return of the children to Nigeria until these orders are in place.

138. The mother also submits that I should not permit a return until mirror orders to protect the mother from the father are in place and I am reminded of case law relating to Hague Convention cases which refer to these types of orders being in place. The mother’s document also highlights the ongoing need for financial matters to be settled before any return is permitted.

139. Lastly, the mother seeks orders or agreements that each party share their address and will provide any new address were they to move on (whether in Nigeria or in this jurisdiction).

Father’s position:

140. Ms Guha (now of King’s Counsel) responds to the mother’s position (and I note that it was the position set out in the C2 and document not to that updating new position set out on mutual exchange of submissions. The father (through his legal team) has not had the opportunity to respond to the changed position. For reasons set out in this addendum judgment I formed the view that they did not need to do so, their position being clearly articular in Ms Guha KC’s document.

141. The father submits to me that the mother not only raises what are arguably new material factors, but that she also seeks now to rely on new evidence without any formal application having been to me to do so. She further submits on behalf of the father that the mother now seeks to argue matters which were before the court (in particular by reference to the undertakings the father offered) at the substantive hearing and that:

"No reasonable or adequate explanation has been advanced by the Mother's legal team as to why they failed to raise any of these issues during the hearing or submissions and are seeking to relitigate the issues following the delivery of the court's judgment."

142. On behalf of the father, it is submitted that the submissions now go beyond simply implementation and timing of the order.

143. I am advised that contrary to the mother's assertions that there are no school places for the children in Nigeria, the father asserts that there are places ack in their old school in Port Harcourt. I have no evidence about this either way.

144. In response to the mother's submissions in her statement filed with her C2 the father sets out detailed responses to those matters the mother had raised on 4 April 2024, including addressing the question of payment to the mother of flight costs, meeting her housing costs upon her return to Nigeria (now a moot point as the mother's case has changed again). He has not been able to address me on the question of 'contact' but properly reminds me that in relation to the parties' third child 'J', I have no jurisdiction to make orders relating to her.

145. In relation to the approach, I should and can now take to mirror orders the father submits as follows:

Mirror order - the court has already made its determination within its judgment that it would be sufficient for the undertakings offered by the parties to be set out by their respective Nigerian lawyers. The mother is seeking to reargue this issue post judgment without any foundation. The court clearly weighed into the balance as to what assurances must be put in place prior to a return including the payment of a lump sum to

the mother by the father prior to the return. It is submitted that this is an attempt by the mother to further delay matters. The father will agree that both parties provide mutual undertakings that they will co- operate in lodging a consent application for a mirror order to be obtained upon the basis that both parties jointly fund these costs but does not accept that this is a pre-condition to a return.

146. The father invites me to make robust orders for a swift return of the children to Nigeria.

My analysis and decisions:

147. The substantive judgment I gave at the end of March considered the range of arguments presented to me on behalf of both parents. I heard oral evidence from a court appointed expert as to the processes in Nigeria in relation to a number of matters, not least whether Nigeria would make 'mirror' orders in relation to orders I could properly make in the conduct of this case.

148. I addressed the issues relating to domestic abuse and how the mother could be protected were she to return to Nigeria. I set out a number of expectations of both parties in relation to my decisions and in relation to steps each of them could take (both having on the record lawyers actively engaged in children act matters in Nigeria).

149. I note that in relation to the matters I asked to be addressed, I have been provided with little or no update or confirmation that either parent has given instructions to their respective legal teams in Nigeria. I note that the anticipated hearing in Nigeria on 8 April did not happen and that those proceedings have been delayed again until July 2024.

150. I remain clear as to the decisions and assessments I have made and nothing I have been sent, or new submissions made to me have caused me to review my substantive decisions.

151. I note that the mother's case has changed in that she now submits that she will remain living in this jurisdiction and the children should visit her in this jurisdiction in their school holidays. She invites me to make orders relating to that new position. I will not do so and should not do so. Nigeria is currently engaged in welfare decisions relating to the

children and were so at the time when, as I have found, the mother wrongfully and unlawfully removed the children at separate times from Nigeria. The parents are both continuing to engage in that ongoing legal process. The parties' middle child, J, has remained throughout in Nigeria, and I have no jurisdiction to make orders relating to her. I cannot and do not make any orders relating to the time the children live with their mother whether here or in Nigeria. There is an order that the mother has the custody of the children and that she makes them available to have contact with their father. Any changes to this will need to be made by consent between the parents or through applications in the Nigerian process.

152. I have already determined and found that the Nigerian courts will not make mirror orders relating to the undertakings given to me, and have directed that the parents take steps to start an application for consent orders for what I have referred to as 'non molestation orders' to provide this reassurance and protection to the mother. These must be Federal not state orders. I know not if the father has taken steps to do this. He must do so. If the mother chooses not to then this should not prevent the children's return.

153. The mother now asserts that she will not be living in Nigeria, so I do not need to address the question of payment of monies to her to live there. The father confirms to me that he will meet the costs of his children's education by payment directly to the school.

154. I agree with Ms Guha KC that any issues that the mother wishes to raise about the distribution of the proceeds of sale of land must be litigated in the Nigerian appeal court which has jurisdiction over these issues. I have no such jurisdiction.

155. I am also asked to review the orders relating to the father's payment to the mother of the flights for the children to return to Nigeria with Ms Guha KC submitting as follows:

> "the father seeks a variation to paragraph 10 & 11 of the draft order to provide that the father will reimburse the mother the costs of economy one way tickets to Nigeria limited to a maximum of £2000 (in light of the quote that has already been provided by the Mother) within twenty-four hours of evidence of the flight bookings having been provided. There is a significant risk that the mother will seek to frustrate the orders made by the court if this amendment is not made by failing to board the scheduled flight to

exploit the fact that the father does not have the financial means to pay for repeat flight bookings.:"

156. In light of the significant change in the mother's case even between the submission of her C2 application on 4 April and receipt of submission on 9 April, I endorse this change. I am concerned that the mother cannot and will not accept this decision and is taking steps to frustrate the implementation and timing of the children's return to Nigeria.

157. I order that the children must be back in Nigeria to start the summer term on 22 April 2024. In my judgment the need for the children to establish their lives back in Nigeria where (save any appeal to set aside this decision), the mother now submits they should live with their father and sister. I have given careful consideration to the welfare benefits of the children remaining in their jurisdiction for the remainder of the academic year and in particular have regard to any possible changes in the mother's health. This latter point concerns me as I heard evidence that N worries about his mother and I remain concerned that he will be here without the support of his father if his mother's health matters become more acute. I continue to have no evidence about how the mother meets the children's needs here and in my assessment their welfare needs are best met by an immediate return to their home country.

158. I require written confirmation of the school places by 4pm on Monday 15 April and that the father had instructed his lawyers in Nigeria to commence the 'non molestation' proceedings.

159. I release the father from (or do not need now) the father to give undertakings relating to the payment of maintenance to the mother were she to live in Nigeria as she has confirmed that she will remain in this jurisdiction. The father may wish to amend this to confirm he would pay were she to return before the end of 2024.

160. I decline to make orders about exchange of addresses, the mother can pursue this through the Nigerian process if the father declines to allow her to know where her children are living. It may be that with the mother's expressed decision to live here and have the

children visit her here in school holidays that the father may feel more secure in sharing with the mother his home. He must ensure that his solicitors here have that address.

161. I am told that the mother will make an application to appeal this decision if I do not accede to her requests to amend the draft of the order and to allow the children to remain in this jurisdiction until September 2024.

162. It is the mother's right to seek permission to appeal my decision. However, within the rules it is open to me to reduce the time to make an application for permission to appeal and accordingly pursuant to Rule 52.12 (a) I direct that any application for permission to appeal shall be made by 4pm on 18 April 2024, that is four days from the date of this judgment and the orders I approve and make.

163. I otherwise approve the amended orders drafted on behalf of the father and as sent to me by Mr Skinner on 9 April 2024 subject to the amendments I express in this judgment.

164. This addendum judgment shall sit as a continuation to the judgment handed down in draft on 27 March.