



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 40

P1161/23

OPINION OF LADY CARMICHAEL

In the petition

TS

Petitioner

against

S

Respondent

for orders under the Child Abduction and Custody Act 1985

Petitioner: Trainer; BCKM Solicitors

Respondent: Donachie; BTO LLP

4 April 2024

Introduction

[1] The petitioner is the mother of a child, to whom I will refer as Cristina, who had her eighth birthday on the day of the second hearing. The petitioner lives in Chechnya in Russia and is a national of Kazakhstan. The respondent is Cristina's father, who is a British national who resides in Scotland. Cristina is a British national, but has a visa entitling her to reside in Russia.

[2] There is no dispute that Cristina was habitually resident in Russia on 28 August 2023, or that the respondent wrongfully retained her in Scotland on that date. The petitioner

was at that time exercising rights of custody under the law of Russia. The respondent avers that there is a grave risk that Cristina's return would expose her to physical and psychological harm, and place her in an intolerable situation, and that Cristina objects to returning to Russia.

[3] The petitioner has remarried. Different witnesses use a variety of different names to refer to him. I have referred to him as ZSA, as those are the initials of the names that appear in his own affidavit. He is variously referred to elsewhere as "Mansur" and as having names with the initials "SJR".

Background

[4] Cristina lived with both her parents until 8 October 2020 in Sakhalin Island, Russia, which lies just to the north of Japan, off the east coast of the Russian mainland. She has lived with the petitioner since then, until her retention in Scotland. The petitioner and respondent married on 4 March 2010 and were divorced on 8 October 2020 by the Yuzhno-Sakhalinsk City Court of the Sakhalin Province. The court ordered that Cristina was to reside with the petitioner, but that the respondent was to have her in his care for certain periods each week, and also every second weekend. He was permitted to have three weeks of holidays with her either in or outside the Russian Federation. The respondent appealed, unsuccessfully, against that order. He wished Cristina to reside with him.

[5] The petitioner has remarried, to ZSA. She has moved with the child on a number of occasions. On 18 September 2021 she moved from Sakhalin Island to Kazakhstan. On 28 September 2021 she moved from Kazakhstan to Grozny, Chechnya. In August 2022 she again moved to Kazakhstan. She returned to Grozny in mid-January 2023. Cristina did not attend school between 18 September 2021 and 1 September 2022. She attended the

International School in Kazakhstan between 1 September 2022 and 13 January 2023. In Grozny she was then enrolled in a Russian school.

[6] The respondent lived in Sakhalin Island until 12 August 2023. He did so for the purposes of his employment. When the petitioner relocated the child within Russia, to Grozny, which is in the south west of Russia, north of its border with Georgia and Azerbaijan, she placed a distance of 6,000 miles between the child and the respondent. The time difference between the two locations is 8 hours. It was common ground at the hearing that the petitioner did not require the permission of a Russian court to relocate in the way that she did.

[7] Cristina has been in the care of the respondent since 17 July 2023, initially for an agreed holiday with him. He brought her to Scotland with the petitioner's consent on 13 August 2023. She was due to leave Scotland on 28 August but did not do so. On 28 August the respondent informed the petitioner by text message that he was unable to travel because he was unwell. He advised her that he had rescheduled flights so that Cristina would leave Scotland on 4 September 2023. On 4 September 2023 he informed the petitioner that Cristina would not be returning to Russia.

Affidavit evidence

[8] The petitioner submitted that the affidavits of Ar AT, Al AT, and SET (the brother, father and mother of the petitioner) lodged by the respondent did not comply with paragraph 15 of Practice Note No 1 of 2018: Affidavits in Family Actions, which reads:

“Where an affidavit or equivalent sworn statement is sworn in a language other than English, it must contain information of the circumstances in which it was drafted and translated. The original document and the translation must both be provided.”

The affidavits narrated only that the witness in question had been in the presence of a notary and a Russian interpreter by way of remote Teams meeting. Counsel did not submit that I should disregard the affidavits, but that I should accord their content less weight because of this irregularity.

[9] Counsel for the respondent advised that Global Translations had been instructed to translate detailed questions which were then put to each of the witnesses in Russian. The answers were received in Russian, then translated into English. It was those translated answers that appeared in the affidavits. After that, the English language affidavits were translated in full, over video calls, to each of the affidavits, and only then were they sworn. There was, however, no written record of the call that took place, and therefore no written record of the Russian version of the document. If necessary, the translator could confirm.

[10] The procedure described in the Practice Note is aimed at providing transparency where an affidavit is obtained from a person whose first language is not English. It enables the witness to read in her own language exactly what she is being asked to swear or affirm is the truth. It provides an auditable trail, because the content of both the foreign language and English language documents can be checked, and one cross-checked against the other. If the witness does not have a document in her own language, she will be deprived of the opportunity to read over the draft herself and identify any inaccuracies before swearing or affirming. These are all important safeguards and were absent from the affidavits just mentioned. The procedure in the Practice Note should be followed. I note also that the affidavits in question do not describe any of the process described by counsel in her submissions.

[11] The affidavits of Al AT and SET referred to a single “affidavit” given jointly by them on 7 September 2023. That appears to be a reference to 7/13 of process, which is a notarised statement in Russian, and a translation of it. The statement is not a sworn statement. The notary has authenticated the signatures of the witnesses. I have been able to reach conclusions in this case without relying on the evidence of these witnesses, and have not required to consider what weight to give to affidavits produced other than in accordance with the Practice Note.

Audio-visual recordings of the child

[12] Chapter 35B of the Rules of Court makes provision for lodging audio or audio-visual recordings of a child. Unless the court disapplies the provisions of that chapter on the application of a party and on cause shown, particular requirements are imposed in relation to the lodging of productions of this sort, and also in relation to how they are to be kept by the court’s administration. The recordings lodged in this case were not lodged in accordance with the provisions of this chapter.

Respondent

[13] The onus lies on the respondent to establish that there is a grave risk that returning Cristina to Russia will expose her to physical or psychological harm or otherwise place her in an intolerable situation. I set out his affidavit evidence first.

The respondent

[14] The respondent says that he was the main carer for Cristina while the parties were married, and that when he was at work a nanny cared for her. He alleges that the petitioner

misled the court in Russia by claiming that she was in employment when she was not, and that he did not receive a fair hearing. He did not approve of the petitioner's relation with ZSA, who is some years younger than she is. He claims that the petitioner insisted that he communicate with her through ZSA. The petitioner, who had previously not been particularly religious, became much more active in her adherence to Islam, and started to wear a hijab. She became quiet and withdrawn. At an earlier time she had intimated an intention to be baptised into the Russian Orthodox Church.

[15] The petitioner provided only five days' notice by text message of her intention to relocate to Kazakhstan in 2021. His lawyer advised him that he could not prevent her from doing so. The respondent produced text messages between him and the petitioner and ZSA from September and October 2021 (7/4), and also emails containing advice from his lawyer (7/5). He had been comforted by thinking that Cristina would be in Aktau, where her grandparents would be able to keep an eye out for her. After ten days she moved to Grozny. Cristina had a holiday with the respondent in Sakhalin in the summer of 2022. He discovered the petitioner's various moves only when he saw the stamps in Cristina's passport at that time. The petitioner had not informed him where she and Cristina were.

[16] Cristina also spent Christmas 2022 with the respondent. At that time Cristina needed dental treatment. She was scared. The respondent succeeded in calming her down, whereas the petitioner and ZSA had caused Cristina to become more upset. In connection with the dental treatment, the respondent heard the petitioner asking the permission of ZSA to speak to him. When he returned Cristina to the petitioner in January 2023, the petitioner and ZSA were unhappy that the respondent was going to visit the petitioner's parents. Her parents did not like the way the petitioner was living her life and her father had threatened her with a knife. ZSA indicated that if the respondent visited the petitioner's parents, there could be

problems in the future with his seeing Cristina. Cristina heard this and became upset. The respondent did visit, and learned that the petitioner's parents were concerned that the petitioner had changed, and about how she and ZSA were spending money. On 12 January 2023 the respondent learned in a phone call with Cristina that she was returning to Grozny. The petitioner had not told him about that.

[17] The respondent did not have any regular contact with Cristina after September 2021. At times more than two weeks passed without any contact with him. He did not have the petitioner's number, only that of ZSA. Cristina would call him sporadically from a different device.

[18] On 14 July 2023 Cristina contacted the respondent and said she was coming to see him. He had expected to see her later in the month for a planned holiday, and had booked leave for August, as he expected her to be with him then. On 17 July 2023 he learned that she was travelling to him. He had not expected her to be in his care at that time. He took unplanned leave from work and organised a day camp for her to attend. On 22 July the petitioner and ZSA texted to say that Cristina would be flying to Kazakhstan on 30 July for a week, then to Georgia for a two week holiday. He responded to say that he had planned to take Cristina to Scotland as he had tickets for the Edinburgh Military Tattoo on 26 August. Ten minutes later the petitioner and ZSA agreed to the trip. The petitioner took Cristina to the cinema on 23 July and gave the respondent an immigration slip which was required for Cristina to leave the country.

[19] In December 2022 Cristina told the respondent that she wanted to live with him. He did not press her about the matter as they only had a short time together. She was excited about going back to school in Kazakhstan. In July 2023 in Sakhalin Cristina again told the respondent that she wanted to live with him. He raised the matter with the petitioner. He

proposed that Cristina should live with him in Yuzhno, Sakhalin Island. He offered to continue to pay the petitioner the sum ordered by the court in respect of Cristina's care. Cristina had been isolated in the care of her mother and ZSA and had not been permitted to go beyond the garden gate. By contrast she enjoyed a number of activities when in the respondent's care.

[20] The respondent had a health scare on 27 August and attended the teaching hospital in the city nearest to where he lives. He has produced the flight details for the flight that should have returned Cristina to Russia by 29 August. On 1 September the petitioner made a video call to Cristina. The respondent gives the following account of the call:

"They spoke in Russian, but I could understand what they were saying. The first thing the petitioner said to Cristina was, 'Don't you love your Mum?', this got Cristina upset as she obviously does love her and she replied, yes. The petitioner then told her that if I didn't return her to Russia she would contact the police, have me arrested, they would take Cristina back and I would go to jail and we would never see each other again. She then said she was flying to Scotland, Cristina asked why and was told to bring her back to Russia. The petitioner asked Cristina 'don't you want to come back with me' to which she replied, 'I want to live with Dad'".

[21] Both the petitioner and Cristina became upset, and Cristina said that she did not want to speak to her mother any more. After that telephone call, Cristina consistently said she did not want to return to Russia. The respondent explained to her that if they did not travel there would be consequences, that her mother would accuse him of talking her into staying and that they would likely end up in court, but if that was what she truly wanted he would support her decision. He next spoke to the petitioner on 7 September. She was in Kazakhstan. He learned from the petitioner's mother that she was trying to get a visa to come to Scotland. He received numerous calls from the petitioner or ZSA on 11 and 12 September. He did not answer them. He received images from them by text on 12 and 13 September, which he found disturbing. A number involved moving images, some of

which were cartoons, and sent on more than one occasion. Some were sent more than one hundred times, and one on a total of 475 occasions. Some depicted acts of violence and cruelty to animals.

[22] The respondent told his employers that he needed to stay in Scotland for health reasons. He was concerned that he might have a form of cancer. He received medical advice of a broadly reassuring nature on 17 October 2023, but was told that a follow up appointment was needed to make sure. At the time of the second hearing he was still awaiting that further appointment. On 11 January 2024 he was told that his contract could not be continued if he were not able to return to Russia in the near future. He asked if he could work remotely while waiting for his next medical appointment but was told he could not.

[23] The respondent has owned his home in Scotland for 25 years. He does not have a mortgage. He describes accommodation that is suitable for Cristina. Cristina had stayed there for about 10 weeks in 2021. She is attending a primary school near her home. She settled in quickly. He produced an email from the head teacher confirming that. She is registered with a dentist and a GP. She has swimming and dance lessons. A number of family members live within easy travelling distance of the respondent's house. Cristina spends time with cousins and friends. She is happy, but is apprehensive when the petitioner or ZSA calls.

[24] The petitioner has visited Cristina in Scotland and had contact with her. Cristina enjoyed the contact, but told the respondent that the petitioner had been pushing her to change her mind about returning to Russia. When Cristina told the petitioner that she wanted to live in Scotland, the petitioner started crying and said that Cristina obviously didn't love her.

[25] Cristina told the respondent that ZSA had kicked her. It was not long after the petitioner and ZSA left Sakhalin. Cristina was back with the respondent in Sakhalin at the time. He alleges that the petitioner called Cristina a few days later, and that her account then changed to one that ZSA had used his leg to stop her falling on an escalator. Between the Christmas and summer holidays in 2022 Cristina told the respondent that ZSA had given her a “hot bum” when she was misbehaving, and that it was sore. In September and October 2023 Cristina told the respondent that the petitioner had spanked her on the bottom and slapped her on the hand when she was naughty. She said that the last occasion that had happened had been in 2023.

[26] The respondent alleges that the petitioner has adopted an “extreme version of the Muslim faith”. She has told Cristina that she will have to wear a hijab when she is older, and forbade Cristina to have male friends at school. She has made Cristina wear a hijab. The petitioner and ZSA call Cristina “Khadizha”. Cristina lost the relationship she formerly had with her maternal grandparents because the petitioner fell out with them. The respondent facilitates phone calls with them.

[27] The respondent is looking for employment in Scotland and has had two job interviews. He does not think it would be straightforward for him to return to Russia. He anticipates the accusation that he abducted Cristina would cause him difficulties with his visa. There is no guarantee that he would be able to resume work with his former employer. There is uncertainty for expatriate workers because of the conflict between Russia and Ukraine. He held a consultant position, and it is not clear whether he would have any job security in the light of a programme of nationalisation in his area of work. He has been informed that because of the duration of his absence his visa is being cancelled and his

belongings shipped back to him. Sakhalin would have been the only place he could have worked as a result of the sanctions imposed by the United Kingdom.

[28] The respondent does not believe that the petitioner and ZSA would allow Cristina to contact him if she were returned to Russia. He believes that he is no longer “of use” to the petitioner, as he will not be in a position to pay alimony deducted at source from his wages. He considers that he would be at risk of physical harm from the petitioner and ZSA in Russia, and that their messages to him represent threats of physical harm.

[29] The respondent produced photographs which he said dated from August 2022 (7/38 and 39) of Cristina wearing a black hijab, when she was in Grozny. He had taken a screenshot during a video call in June 2023, which showed her wearing a white hijab (7/40). They appeared to be hijabs made for a child. There had been a time when his payroll had had difficulty sending money to the petitioner because certain banks were being sanctioned. The payroll of Sakhalin Energy had contacted the petitioner. He inferred that she must have provided them with different account details, as complaints that she was not receiving money ended. The school fees for the International School in Kazakhstan were 350 USD a month, and he was paying about £5,000 per month as aliment.

[30] On 16 January 2024 the petitioner had told Cristina that she was pregnant, and asked her how she would see her little brother or sister if she did not return to Russia. She had said similar things when she visited Scotland. The petitioner had also made allegations to Cristina during a call about some of the witnesses who had provided affidavits for the respondent. His solicitors had corresponded with the petitioner’s agents about this matter. Cristina had become reluctant to speak to her mother by phone. The petitioner had asked Cristina why she had lied to the child psychologist about not wanting to return to Russia.

She had told Cristina to report and record any occasion on which her father shouted at her, hit her or touched her. She told Cristina that her father was “a bad man”.

[31] The respondent had visited the website of Genium, the school Cristina had attended in Grozny. It followed the Russian curriculum, but also had “an entire section about Islam”. He regarded that as contradicting the petitioner’s assertion that she and ZSA were not forcing Cristina into the Islamic religion.

WM

[32] WM is a friend of the respondent’s and lives near him. She had previously seen Cristina only during her holidays in Scotland. She now sees her regularly. Cristina plays with her children. She describes a warm relationship between Cristina and the respondent. Cristina has become more confident during her time in Scotland. She initially expressed fears that her mother would take her away. Cristina is adamant that she wants to stay in Scotland. She has said that she was not allowed to dance in Russia. She has also said that she misses people and things in Russia. She would be heartbroken if parted from her father.

GR

[33] GR is WM’s partner. He sees the respondent and Cristina regularly. He describes the relationship between the respondent and Cristina as loving. Cristina has expressed a wish to remain in Scotland.

NS

[34] NS is the respondent’s sister in law. She also describes a warm relationship between Cristina and the respondent. She says that Cristina is happy at school. Cristina plays with

NS's children, who are Cristina's cousins. She has said that she has a good friend in Russia whom she misses. She knows of Cristina's situation in Russia only from the respondent's account of that. Cristina would struggle initially if she were away from the respondent as she was settled, happy and content with him.

IRS

[35] IRS is NS's partner, and the brother of the respondent. He sees Cristina weekly. She says that she likes living in Scotland and that she likes school.

KV

[36] KV was formerly best friends with the petitioner. She has known the respondent since 2011. She lives in Scotland. The petitioner stopped contact with her in 2018 following an incident that caused them to fall out with each other. The petitioner had also fallen out with a mutual friend in about 2020. She met the respondent and Cristina in September 2023, at which time Cristina did not want to return to Russia. KV expresses views about the living situation of Cristina in Grozny, but it is not clear that she has any information other than that provided to her by the respondent. KV describes Cristina's life and activities in Scotland, and her relationship with the respondent, in positive terms.

SET

[37] SET is the petitioner's mother. As I have already noted, she adopted in her affidavit the terms of an earlier signed statement given jointly with her husband. That statement sets out various concerns. The petitioner had distanced herself from her family since forming a relationship with ZSA. The petitioner and ZSA spent a great deal of money although

neither of them worked, and SET and her husband inferred that they were spending alimentary payments provided by the respondent and intended to support Cristina. The petitioner has begun to wear niqab and hijab. When SET and her husband voiced concerns, they received threats and abuse. Cristina appeared withdrawn when in ZSA's presence, and contact with her had reduced in quantity and quality. The petitioner and ZSA had made false statements about the respondent. Cristina was happy in the care of the respondent, about whom SET and her husband spoke in complimentary terms, and they supported his having care of Cristina.

[38] The affidavit is consistent with that statement. The quantity and quality of contact with Cristina had improved since she had been in the care of her father, and she appeared to be happier. SET was concerned that ZSA was causing Cristina to "read the Namaz", which I understand to be a reference to engaging in a particular form of prayer, when she was too young. SET was concerned also that ZSA and the petitioner were calling Cristina "Khadizha". Although she was herself a Muslim, she did not understand why they were doing that. She worried that Cristina might be subjected to an arranged marriage while still a child. She believed that her daughter had been brainwashed, and that ZSA controlled her. She described the petitioner as a fanatic.

Al AT

[39] Al AT is the petitioner's father. He also adopted the signed statement by him and SET. He described a background of conflict with ZSA. Al AT had gifted an apartment to the petitioner. ZSA and the petitioner wished to sell it and use the money to live in Turkey. Al AT was unhappy about that. ZSA and the petitioner had threatened him. ZSA had also threatened the respondent and told lies about him.

[40] Like SET, Al AT described more frequent contact with Cristina when she was in the care of her father. He voiced similar concerns about requirements that Cristina adopt particular Islamic practices, including wearing forms of dress to cover herself up completely. ZSA would prevent Cristina from communicating with the respondent, because the respondent was “a non-believer and a man”.

Ar AT

[41] Ar AT is the brother of the petitioner. He had visited the petitioner, ZSA and Cristina in Aktau in August or September 2022. ZSA’s manner of bringing up Cristina was harsh. He would raise his voice and prevent her from using her mobile phone. He did not let her phone her father. He was strict as to what she should wear and as to how she should behave. The petitioner had declined to intervene. During incidents when ZSA was trying to discipline her, Cristina told Ar AT that she wanted to go to Scotland and be with her father. Cristina appeared happier since being in the care of her father. Ar AT believed that ZSA regarded Cristina as a means to accessing the funds provided by her father as an alimentary payment.

Evgeny Kuzmenko

[42] Mr Kuzmenko is the respondent’s lawyer in Sakhalin. He represented the respondent in the divorce proceedings and the appeal. The divorce proceedings were decided on the basis of a psychological report that vouched that Cristina had a stronger connection with her mother than with her father, notwithstanding that the respondent had been critical of that report and had provided detailed objections to it. There had been no limitation on the petitioner’s ability to relocate with the child. It was possible for a change of

residence to be regarded as a circumstance meriting a further claim to the court seeking a change in the order as to the parent with whom the child was to reside. The situation was different where a child had a Russian passport. Either parent could object to the removal of the child from Russia. That was not the case so far as Cristina was concerned.

[43] The petitioner's change of residence would not be regarded as a violation of the order regulating residence unless she had acted specifically to limit communications between the respondent and Cristina. The respondent did have the right to apply to change Cristina's residence. If a child was aged 10 years, his or her opinion would have to be taken into account. For younger children a psychological report was required to determine the parent with whom the child had the stronger connection. The respondent could not prevent the petitioner from changing Cristina's school or residence, although frequent changes of school, or unsatisfactory arrangements could be taken into account in an application by the respondent to change the parent with whom Cristina resided. It would be possible for the respondent to litigate in Russia while living in Scotland. In Russian proceedings the court would require an assessment of the conditions in which the child would live at a particular address and that would be carried out by a Russian guardianship body. That could not be done in respect of an address in Scotland, although it would be open to the respondent to submit an equivalent assessment carried out in Scotland. There was no guarantee that the Russian court would accept that.

[44] Cristina could not herself make an application to the Russian courts to change the parent with whom she resided. Physical chastisement of children was formally prohibited in Russia. In theory physical chastisement could form the basis for an application to change the parent with whom the child lived, but in practice it was hard to prove in the absence of medical evidence. In theory, bringing a child up in an extreme sect or in a faith inconsistent

with his culture or habits could also be a reason for a court to change the parent with whom the child lived. Mr Kuzmenko saw little scope for the enforcement in Russia of any undertakings that the petitioner might offer to this court. He thought it unlikely that the respondent would be arrested for kidnapping Cristina, although he could not rule out the possibility. He was not an expert in the area, and recommended that the respondent should consult someone better qualified.

[45] If Cristina were returned to Russia and the respondent had concerns about her he could inform the guardianship authorities. Those authorities would generally interview the child and the parent with care, but could remove a child on the basis of an immediate threat to life or health. They exercised that power rarely.

SW

[46] SW is Cristina's class teacher. Although at one point Cristina could become emotional when things were difficult, that had resolved. She had settled in well and was doing well academically.

Petitioner

The petitioner

[47] The petitioner disputed the respondent's allegations that during their marriage she had engaged in socialising rather than caring for Cristina. That had been borne out by the view of the psychologist in the Russian proceedings about Cristina's attachment to her. The respondent had abducted Cristina because he did not accept the decision of the Russian court.

[48] It was untrue that the petitioner had threatened the respondent with any form of response or reprisal from ZSA. It was true that she preferred to communicate with the respondent through ZSA, but that was because she found the respondent “very difficult”. They had not divorced amicably, and she did not want to have to speak to him at all afterwards. She was an independent person, as was evidenced by her having come to Scotland alone in late 2023 for contact with Cristina.

[49] She had been born a Muslim, although her parents were not devout. Religion was discouraged in the Soviet Union. At one point many of her friends had been Russian Orthodox, and she had thought that perhaps she was also. When she visited Dubai she found a stronger connection to her faith and heritage. That was before she met ZSA. The respondent had been unsympathetic. It had been her own decision to wear a hijab. She did not make Cristina wear a hijab. She had tried one on twice. It was normal for girls to want to look like their mothers. Allegations that Cristina was prohibited from eating foods like ice cream were untrue. There was no prohibition on Cristina’s being friends with boys, or on dancing.

[50] The petitioner produced a series of photographs and videos of Cristina dating taken between October 2021 and November 2023. These included a photograph that appears to have been taken at school in May 2023 showing her in western dress, holding hands with a boy in a mixed sex group which is accompanied by an adult wearing a head covering (6/14). They include also a video of Cristina in a mixed sex group of children in a paddling pool in June 2023, and a number of videos showing her dancing. Those include one of her dancing on stage along with other children to a mixed-sex audience of adults, said to date from June 2023. One of the women in the audience is wearing a head covering, but others are not.

[51] The petitioner and ZSA did refer to Cristina as Khadizha, but it was similar to using a pet or diminutive name. They also called her Cristina, and she was registered at school using that name. There was no need for a child to be in school in Russia or Kazakhstan until the age of six, so it was not correct to suggest that Cristina should have been in school in 2021. She had produced letters from both Genium and from Eton House International School in Kazakhstan. Both were in positive terms regarding Cristina and the support her mother provided for her learning.

[52] The aliment provided by the respondent was a lot of money for Chechnya, where the cost of living was not high, but it was wrong to suggest that the money was not used for Cristina. The petitioner and ZSA made sure she had everything she needed and a lot of the money had gone to her school fees.

[53] The petitioner had moved from Sakhalin because she had hated it there. There was a great deal of pollution and temperatures were very low, particularly in the winter. She felt lonely as she was far from her family in Kazakhstan. She had discussed the move with the respondent three months before leaving.

[54] Cristina's school in Aktau had been really good. The petitioner's apartment had still not been ready in September 2022, so they had rented a place to live. They had moved from Kazakhstan to Grozny in January 2023 because of difficulties in receiving money, and because of difficulties with the petitioner's parents. Since leaving Sakhalin in 2021 the petitioner and ZSA had "tried [their] best" so far as contact between the respondent and Cristina was concerned. The respondent had never tried to stop them from moving. The petitioner's parents had been hostile towards ZSA from the first time that they met him.

[55] Neither the petitioner nor ZSA chastised Cristina physically.

SKK

[56] SKK is the petitioner's cousin. She last saw the petitioner and Cristina together in person in February 2022, although she spoke to the petitioner daily on WhatsApp, and had often spoken to Cristina by phone. The petitioner and Cristina got on very well, and the petitioner was a good mother. She thought the petitioner's husband was a good guy, and that he was good with Cristina. Although the petitioner now believed in Islam, she did not try to impose that on other people. She knew that the petitioner had fallen out with her parents, and attributed that to the disappointment of the petitioner's father that the petitioner had been a girl, rather than a boy, and to his mistreatment of the petitioner when she was a child.

ZSA

[57] ZSA and the petitioner moved from Sakhalin because the petitioner had never wanted to live there, and only did so because of the respondent's work. The climate was unforgiving and she did not see it as a place to raise a child. They had considered living in Kazakhstan, but the petitioner's apartment there had needed refurbishment. ZSA was from Chechnya, and as Cristina was not due to start school for a year, they went there. They had planned to return to Kazakhstan in 2022 when they hoped the apartment would be ready. They did so, and Cristina started at Eton House International School there, but they struggled to pay the fees because of sanctions on money coming from Russia, and there were issues with the petitioner's relationship with her parents. Cristina then went to a school called Genium in Grozny. She was happy when she lived with ZSA and the petitioner.

[58] According to ZSA, his relationship with the petitioner's parents was poor from the outset, because he had refused to take an alcoholic drink with her father. The petitioner's father had referred to him and the petitioner as terrorists, and had threatened them with a knife. Although he felt he had nothing to apologise for, ZSA had apologised to the petitioner's father. He believed that her father was responsible for a time when he and the petitioner were questioned at the airport.

[59] Cristina was well-behaved and the most he had required to do was threaten to take her toys away. It was the petitioner's own choice to wear the hijab. There was no expectation that Cristina would do the same. Cristina had voluntarily copied him and the petitioner by praying. ZSA thought he had got on well with the respondent and respected his position as Cristina's father.

AMG

[60] AMG is a teacher at the Genium school, where Cristina was a pupil between January and May 2023. She had a one hundred per cent record of attendance, and performed well in all her subjects. She was friends with her classmates and a diligent student.

AS

[61] AS is from Latvia, but lives in the same area of Scotland as does the respondent. She met the petitioner when the petitioner was visiting Scotland in November 2023 for the purposes of contact with Cristina, and they have kept in touch since. She and her children had joined the petitioner and Cristina in some activities in November and December 2023. She found Cristina to be an "ordinary little girl". If she was upset she would go to her mother for comfort, but she was in general happy. She obviously liked spending time with

her mother. She said on one occasion that she wanted to stay with her mother overnight, but she changed her mind after her father came and met her. He said she didn't have things with her that she would need for an overnight stay. In AS's opinion it would not have been a big deal to collect the things she needed.

MDK

[62] MDK lives in Kazakhstan. She is a friend of the petitioner. She saw a lot of the petitioner, ZSA and Cristina between August 2022 and January 2023. Her children used to play with Cristina. Cristina has seemed like a very happy girl. She was very close to her mother. MDK understood the family left because of sanctions and issues with getting their money from Russia, and because of the breakdown in relations between the petitioner and her parents. She understood that they did not like the petitioner wearing a hijab, or her adherence to Islam. She thought ZSA was a kind person and it was clear that Cristina loved him a lot.

Cristina's objection to return

[63] Parties agreed at the first hearing that a psychologist should be appointed to report on Cristina's age, level of maturity and capacity; whether she objected to being returned to Russia, and, if so, why; and whether, and if so to what extent, her views were independent of parental influence.

[64] Dr Katherine Edward, Chartered Clinical Psychologist, reported that Cristina presented with age-appropriate maturity. She presented with no capacity or learning issues but likely had verbal and performance skills that were above average for her age.

Dr Edward assessed those skills using the Wechsler Abbreviated Scale of Intelligence, and Cristina's skills were equivalent to those of a child aged 10 years.

[65] Cristina was consistent and clear in presenting her view that she would like to remain living in Scotland with her father. She does not wish to return to live in Russia. When Dr Edward explored why Cristina would prefer that outcome, Cristina spoke of her positive relationship with her father, and said that she felt that that was something she had always had from when she was young. She referenced her mother speaking negatively about her father during recent calls, and was not confident that she would get to see her father as much as she would like if she returned to Russia. Her connection to her school and community activities in Scotland was a factor in her reasoning. She indicated clearly that she would still wish to see her mother. She spoke positively about her life with her father and in Scotland, and presented as embedded and integrated into her school and community. She had good memories of her life in Russia and missed her friends. She could also speak of more difficult times, particularly during and after her parents' separation, and times apart from her father. Dr Edward reported that Cristina presented with a clear and well-reasoned objection to return to Russia, and that her reasoning was sound, age appropriate, and did not raise concern.

[66] Cristina did not present with any "red flags" that might be seen in a child who was being actively alienated from a parent, such as complete rejection of the parent, a negation of prior positive memories, or an inability to consider nuance in her situation. Cristina had a sense that her mother would be upset if she did not return to Russia. Her mother had spoken negatively about her father and this had a detrimental impact on Cristina's emotions. She had a sense that her father would be happy for her to stay with him. She said that her father did not speak negatively about her mother. She did not want to make either

parent sad. Dr Edward expressed the views that Cristina's sense of responsibility for her mother's feelings was an area of emotional concern, and that aspects of her mother's response might be encouraging Cristina's wish to remain in Scotland. Dr Edward expressed her view in summary, in the following terms:

"Cristina is aware of her mother's emotions around the current situation and although she feels more emotional responsibility for her mother's wellbeing this has not influenced her reasoning or view. Cristina does not present with any evidence of being overtly or covertly influenced to present the views of her father as her own."

The law

[67] Article 13 of the Hague Convention provides that the judicial authority may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views.

[68] In *M, Petitioner* 2005 SLT 2, at paragraph 38, Lady Smith opined that if the child objected and was of an age and maturity at which it was appropriate to take account of his views, the court should consider a number of matters in determining whether to exercise its discretion. Those matters were comity, convenience and the general principle that it is in the best interests of a child for his interests to be determined by the court of his habitual residence. The court should also take into account the strength of the objection, whether it was independent of the views of a parent, and whether the child appreciated that the purpose of the order for return would be to enable the court of his habitual residence to decide on his future, and his welfare in the immediate future.

[69] Taking account of the views of a child does not mean that those views are determinative or even presumptively so: *In Re M and another (Children) (Abduction: Rights of*

Custody) [2008] 1 AC 1288, paragraph 46. In that case paragraphs 42 and 46 Lady Hale said also:

“42. In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another’s judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states.

...

46. [...] Once the discretion comes into play, the court may have to consider the nature and strength of the child’s objections, the extent to which they are ‘authentically her own’ or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child’s objections should only prevail in the most exceptional circumstances.”

[70] Whether a child objected and was of an age and maturity at which it was appropriate to take account of her views should be confined to a robust examination and avoid sub-tests and technicality: *In Re M (Children)* [2016] Fam 1, paragraph 69. In the same case the Court of Appeal emphasised the need to give weight to the 1980 Convention considerations. The Convention would work only if, in general, children wrongfully retained or removed from their country of habitual residence were returned, and returned promptly.

[71] In *H, Petitioner* [2014] CSOH 79 the Lord Ordinary declined to return to Norway a 13 year old child who objected. The child presented as having more insight and maturity than might be implied from her chronological age. The Lord Ordinary rejected the proposition that little weight ought to be attached to her views because it was not clear whether she appreciated that on return to Norway the court there could address the question of custody.

[72] In *W v A* 2021 SLT 62, the Inner House granted a reclaiming motion by a respondent, holding that the Lord Ordinary had failed properly to exercise his discretion where a child had objected to return. In that case the long term decision on residence remained with a Polish court by virtue of Article 11 of Council Regulation (EC) no 2201/2003, and the question was whether or not the child should remain in Scotland pending that long term decision. The child had been in Scotland for more than a year at the time of the Inner House's decision. At paragraph 9 Lord Malcolm, delivering the opinion of the court, said:

“The question is whether in the meantime the child should be returned to Poland pending that decision. In this regard courts are increasingly giving weight to the views of the child. A child centric approach is required, with her interests and general welfare at the forefront. The focus is not on the moral blameworthiness of the abducting parent, nor on notions of deterrence. While Convention considerations will always be relevant, the further one is from the main aim of a speedy return, the less weighty they will be. If a child is integrated in the new community it is relevant to consider the effect of a further, and unwanted, international relocation pending the long term decision.”

I observe that in *W v A* there was no question of subversion of the Convention principle that it is in the best interests of a child for her interests to be determined by the court of her habitual residence, because the matter was essentially one of interim regulation of matters until a decision was made by a Polish court.

[73] I was referred also to *MP, Petitioner* [2023] CSOH 58 in which the Lord Ordinary had exercised his discretion to decline to order return where two children, aged 13 and 8, had objected.

Decision

[74] I am satisfied that Cristina has objected to return. That is clear from Dr Edward's report. Cristina has the maturity to be expected of a child her age, which is 8 years, although her intellectual abilities exceed those to be expected at her chronological age. Her views are

reasoned and age appropriate. I am satisfied that she is of an age and maturity such that it is appropriate for me to take account of her views. The fact that she is still very young is not inconsistent with that conclusion, but is a factor to take into account, amongst others, in assessing the weight to be given to her view.

[75] It follows that it is open to me to exercise a discretion as to whether or not to order return.

[76] Dr Edward did not discuss, nor was she asked to discuss, with Cristina whether she understood that if she were returned to Russia that would be with a view to a court there addressing the question of which parent she was lived with. I do not regard that as reducing the weight that should be given to her view, for much the same reasons as those expressed by Lord Doherty in *H, Petitioner* at paragraph 13.

[77] There is independent evidence from Cristina's school teacher that she has settled well into school. Although a number of the witnesses who speak to her integration into the community are connected to the respondent, and partial to his case, there is no reason to doubt that she is in fact happy in Scotland, and settled here, particularly given her presentation to Dr Edward. While I accept that these are factors relevant to her general welfare, I am cautious about attaching much weight to them. The first object of the Convention is to deter parents from pre-empting the result of a dispute between them about the upbringing of a child. In the event of an abduction the next object is to restore the child to her home country so that the dispute can be determined there. The abducting parent should not gain an unfair advantage by having the dispute determined in the place to which he has come: *In Re E (Children)(Abduction): (Custody Appeal)*, [2012] 1 AC 144, paragraph 8. Where a discretion falls to be exercised because a child's objections fall to be taken into account, according too much weight to the integration of the child in the community to

which the abductor has taken her risks undermining those objectives. I am, however, satisfied that Cristina is well-cared for in Scotland and that she has accommodation and educational and leisure opportunities that meet her needs.

[78] In line with the guidance provided in *W v A*, the moral blameworthiness of a parent is likely to be of little assistance to the court in exercising its discretion. I record, however, that there is some information to indicate that the respondent did not plan to abduct or retain Cristina when he brought her to Scotland in 2023. He has produced documentation vouching that he had purchased return flights for himself and Cristina which would have resulted in her arrival in Russia on 29 August 2023, and also that he had purchased flights from Edinburgh to Moscow via Istanbul which would have resulted in her arrival in Russia on 5 September 2023. He has not produced any vouching in relation to the medical condition that he says caused the initial delay.

[79] Although some time has now passed since the respondent retained Cristina in Scotland, that has not happened because the petitioner has delayed in trying to take action. She appeared at a very early stage in the proceedings brought by the respondent in this court, and it has been clear throughout that she wished to have Cristina returned to Russia. She describes in her affidavit some difficulties in obtaining representation, and also in obtaining information from the Russian Central Authority about the progress of her application, and a delay in their sending the matter to the Scottish Central Authority.

[80] For the reasons given in relation to the “grave risk” case, I am not satisfied that the respondent has made out any serious welfare concerns so far as the care of Cristina in Russia is concerned. I take into account that after the parties divorced, and until August 2023, the petitioner was Cristina’s primary carer.

[81] Cristina is a young child, and I take that into account in considering how much weight to give to her objection. Generally speaking, more weight will fall to be accorded to the objections of older children. I do, however, accord considerable weight to Cristina's objection, for the following reasons.

[82] I have no reason to doubt or reject Dr Edward's conclusions which are to the effect that Cristina's parents have not influenced her view, and in particular that her father has not overtly or covertly influenced her view. I am satisfied that her views are authentically hers. Cristina told Dr Edward that she was motivated by her positive relationship with her father, which she felt was something she had always had from when she was young.

[83] It is relevant that Cristina's views have been formed in a context where, for a significant period, she was deprived of regular contact with her father. Although Cristina spent some holidays with him, in September 2021 the petitioner relocated with her to a distance of 6,000 miles from the respondent, and the contact arrangements put in place by the Russian court were not complied with. Dr Edward noted that Cristina was able to speak of "more difficult times, particularly during and after her parents' separation, and times apart from her father". She was not confident that she would see her father as much as she would like if she were returned to Russia. She did not in fact see him for lengthy periods when they were both living in Russia, but far distant from each other, and when she was living in Kazakhstan and he in Russia. It cannot be said that her views are not grounded in reality. They have been formed in the context of her lived experience between September 2021 and August 2023. Dr Edward observed also that it was possible that aspects of the petitioner's response to the present situation were encouraging Cristina's wish to remain in Scotland.

[84] Against that background, I am not persuaded that either the policies underlying the Convention, or the petitioner's role as primary carer are factors of such gravity as to prevent me from exercising my discretion to refuse to order the return of Cristina to Russia. I decline to order her return.

Grave risk of physical or psychological harm/intolerable situation

[85] Given my conclusion in relation to Cristina's objections, I record my views about this matter relatively briefly.

The law

[86] Article 13(b) of the Hague Convention provides for a discretion to refuse return where there is a grave risk that the return of the child would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

[87] Although "grave" characterises the risk rather than the harm, there is a link between the two. A low risk of death or serious injury might be qualified as grave, while a higher level of risk might be required for less serious forms of harm. Intolerable means a situation which the particular child in the particular circumstances should not be expected to tolerate. The situation must be assessed as it would be at the point of return to the child's home country: *In Re E (Children) (Abduction Custody Appeal)* [2012] 1 AC 144, paragraphs 33-36. Clear and compelling evidence of a grave risk of substantial harm is required. That is much more than the risk inherent in any unwelcome return to the country of habitual residence: *ML v JH* [2021] CSOH 50, paragraph 15.

[88] If there are competing and contradictory affidavits with no other evidence to support a conclusion one way or the other, no conclusion can be drawn: *D v D* 2002 SC 33. In cases

involving grave risk, however, the court must first ask itself whether, if the disputed allegations are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. The court must evaluate the available material and analyse the nature and severity of the risk. The greater the risk and the more severe the harm, the more effective protection is required than if the risk is lower and the harm less severe: *AD v SD* 2023 SLT 439.

The respondent's case

[89] Each of the respondent's concerns looked at individually and cumulatively would support a finding of "grave risk". Counsel relied principally the cumulative effect of those concerns.

- (a) ZSA physically chastised Cristina by kicking her, and by giving her a "hot bum". The petitioner also physically chastised her by spanking and slapping.
- (b) The petitioner and ZSA imposed their religion on Cristina. She was not allowed to listen to music or dance. She was made to engage in religious practices unsuited to her age.
- (c) The petitioner and ZSA moved on a number of occasions and disrupted Cristina's education.
- (d) The petitioner and ZSA isolated Cristina from the respondent and from her maternal family. She was not allowed freely to contact the respondent.
- (e) To separate the child from the respondent would place her in an intolerable situation.

Decision

[90] In relation to some of the disputed allegations there is information available other than simply the competing affidavits of the parties. In particular, the photographs and videos produced by the petitioner tend to show that some of the concerns expressed by the respondent are overstated. Those are that Cristina is required to wear Islamic dress, that she was not allowed to dance when in the petitioner's care, and that she was not permitted to associate with boys.

[91] The allegations of physical chastisement are disputed. Counsel for the respondent conceded that the allegations of physical chastisement were relatively few, and were at the lower end of the range of seriousness. She accepted that, following the approach in *E* it would be necessary to demonstrate a high level of risk of the events occurring. Cristina did not mention physical chastisement as a factor informing her objection to return. Assuming these allegations to be true they do not present a grave risk of physical or psychological harm to Cristina. Even if they did, they are circumstances which could be put before a Russian court in support of an application to change the parent with whom Cristina resides, according to Mr Kuzmenko's evidence. That is notwithstanding his observations about the potential difficulties in proving allegations of that sort, and in having an assessment carried out of the respondent's home in Scotland.

[92] There are competing accounts of the background to the petitioner's estrangement from her parents involving allegations by her parents and counter-allegations by the petitioner and ZSA. I am unable to resolve these differences, and do not require to do so in order to dispose of this case. The circumstance that a parent has become estranged from her own parents, and that, in consequence, the contact between a child and her grandparents

has become limited is not obviously indicative of a grave risk of physical or psychological harm to the child, or of her being put in an intolerable situation.

[93] There is a dispute as to whether the petitioner has adopted a conservative form of the Islamic faith and whether she has required Cristina to participate. Even if she has, I am not persuaded that the adherence of a parent to a conservative religious practice, and requiring or encouraging a child to engage in religious practices, such as saying particular prayers, would give rise to a grave risk of harm or of placing the child in an intolerable situation, absent some particular practice obviously liable to harm the child. I note that in explaining to Dr Edward why she wished to remain in Scotland, Cristina did not raise any concern about religious practices in which she was expected to participate in Russia.

[94] It is true and undisputed that Cristina has moved between Kazakhstan and Chechnya on a number of occasions. She had to change schools when she moved from Kazakhstan to Grozny in early 2023. There are reports that indicate that she did well at each of the schools she attended. Changing locations frequently and changing schools is inevitably disruptive to a child, and may be undesirable, but I am not persuaded that what has happened to date in this case supports the respondent's case on grave risk.

[95] There is a dispute as to whether the petitioner prevented regular indirect contact between Cristina and the respondent. By relocating she did prevent the regular direct contact that the Russian court had ordered. Cristina has had a number of holidays with the respondent, and it cannot be said that the petitioner has prevented all direct contact between her and the respondent. There is no evidence that Cristina suffered psychological harm as a result of either the undisputed or disputed limitations on her contact with the respondent, or that she will suffer psychological harm if her contact with him is limited in a similar way in the future. I have no doubt, however, that she will be distressed if that occurs. The images

and animations sent by the petitioner and/or ZSA to the respondent do give rise to legitimate concerns as to their attitude to the respondent and as to their support for his relationship with Cristina. Their attitude to that has already been evidenced by their relocating in ways that inevitably disrupted that relationship.

[96] All of these matters are capable of bearing on what arrangements will be in Cristina's best interests, and might come to be considered by a court considering what will best serve her welfare. I am not, however, persuaded that either individually or collectively they demonstrate a grave risk that Cristina's return to Russia would expose her to physical or psychological harm or otherwise place her in an intolerable situation.