Neutral Citation Number: [2015] EWHC 1433 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2015

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

- -

In the matter of M (Children)

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- -

Mr John Vater QC (instructed by the Joint Legal Team at Reading Borough Council) for the applicant local authority
Ms Tina Villarosa (instructed by S A Carr & Co Solicitors) for the parents (on 8 May 2015)
Miss Ciaran Gould (Force Solicitor) for the Thames Valley Police (on 8 May 2015)

Hearing dates: 5, 6 and 8 May 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was handed down in open court

Sir James Munby, President of the Family Division :

1. I am concerned in this case with the welfare of the four children of Asif Malik and Sara Kiran. They are all British citizens. Their ages range from 20 months to 7 years. They were made wards of court by Baker J on 5 May 2015. They remain wards of court. Section 12(1)(a) of the Administration of Justice Act 1960 therefore applies.

2. Part of the history is already in the public domain. That part is not and never has been subject to any reporting restrictions. The other part of the history has not hitherto been in the public domain – in large measure because of a reporting restriction order which I imposed on 5 May 2015 but which I can now discharge.

3. The case involves important questions in relation to the proper ambit of the court's wardship jurisdiction and the use of what are commonly called super-injunctions. I accordingly give judgment in open court.

The story as known to the public

4. The story as known to the public can be set out very shortly. The story seems to have broken in the United Kingdom on Sunday 19 April 2015 and was extensively reported in the United Kingdom media. The family had apparently left home, without warning and without telling the wider family, on 7 April 2015. They were caught on CCTV going through customs at the Port of Dover at about midnight the same day, leaving the United Kingdom on a ferry that departed very early next morning. Some days later (in fact on 16 April 2015) they were reported missing to the Police. On 19 April 2015 the Police appealed for information about their whereabouts. The acting Deputy Chief Constable of the Thames Valley Police was quoted in media reports as voicing concern that the family might be travelling to Syria, though "not suggesting for one moment that they are intending to join Islamic State." The same day, as it subsequently transpired, the family crossed the border into Turkey. They were detained by the Turkish authorities in Ankara on 20 April 2015, a fact reported in the United Kingdom media later the same day.

5. Late on 5 May 2015 the United Kingdom media reported that, having been deported "of their own will" from Turkey to Moldova, the family had been detained in Moldova.

6. On 8 May 2015 the United Kingdom media reported a hearing before me earlier that day in which I disclosed that the family had returned to this country.

What was happening behind the scenes

7. Behind the scenes there had been extensive collaboration between the local authority, Slough Borough Council, the Police and the Foreign and Commonwealth Office (FCO). Proceedings were drafted on Monday 4 May 2015. Early the following morning, at about 5.40am on Tuesday 5 May 2015, the decision was taken by the local authority to make an ex parte (without notice) application later that morning. At about 7.00am the local authority was informed by the FCO that it would be "pointless" if an order was not obtained by 11.00am. At about 7.30am, Mr John Vater QC, on the instructions of the local authority, contacted the 'out of hours' duty officer, saying that an urgent telephone hearing with the 'out of hours' judge was

required. The draft order and the unsworn affidavit of the solicitor acting for the local authority, Miss Sarah Castle, were emailed to the duty officer for onward transmission to Baker J, the 'out of hours' judge. Exhibited to the unsworn affidavit were a statement of Detective Inspector Horsburgh dated 30 April 2015 and a briefing note dated 24 April 2015 produced by the Police for the purpose of family court proceedings. The telephone hearing before Baker J commenced at about 8.15am.

8. Miss Castle's unsworn affidavit contained additional information, including the following:

> "it is the belief of the police and Counter Terrorism Unit that the parents intended to cross into Syria with their children in order to join Islamic State [details were given which I do not propose to recite] … Whilst it is the belief of the police that the family was heading towards Syria, the family has maintained that they were on holiday. In any event, that claim must be set against the fact that the family had travelled across Europe effectively on public transport, had told no-one of their holiday plans, and were heading towards the Turkish/Syrian border at the point of their arrest.
>
> Upon their arrest by the Turkish authorities, the family's passports were impounded and their Visas withdrawn … As we understand it, a number of attempts were made by the British Consulate to negotiate a return to the UK consensually … It was hoped … that the children could be returned to the UK consensually. In any event, it had been the intention of the Local Authority to conduct some assessment for itself of the children's immediate well-being in the detention centre. It was planned that social workers would fly to the family in Ankara on Tuesday 5th May 2015 ...
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> On 4th May at about 15:00 hours it transpired that the Turkish authorities had negotiated with the family that they should be deported to Moldova via a flight to Chisinau departing Istanbul at 1pm (UK time) on 5th May 2015 …
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> It is the Local Authority's broad view that the children have suffered significant harm and are likely to do so in the event that Wardship Orders are not made. We take that view for these reasons:
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> • On the basis of the information the police and SE Counter Terrorism Unit has been willing to share, there are reasonable grounds for believing that this family left Slough on about 8th April 2015 in order to join Islamic State in Syria;
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> • If that is right, the parents chose to expose their children to obvious risks in so doing;

> • Also if that is right, the parents removed the children from their close and local family, educational and health provision, peremptorily. Whilst we cannot know the impact of this, without further assessment it is reasonable to believe that the children's education and emotional well-being has been affected by this peremptory and unplanned removal;
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> • The deportation to Moldova represents another peremptory move of the children to another State which is entirely alien to them. Neither they nor their parents can communicate in Moldova;
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> • There is no information available in relation to why the parents chose to be deported to Moldova or what their plans are for their children when they arrive there. Nothing at all is known about the Moldovan Government's attitude towards the family, what supports might be available, where the children will live or how the family will sustain itself;
>
> • According to the FCO's Global Response Centre, once the family sets foot in Moldova it will be entirely free to travel wherever it wishes.
>
> In those circumstances, the Local Authority takes the view that it is necessary in the children's interests for them and their parents to remain in a known location (namely the detention centre in Turkey) where they can be accessed by FCO liaison … pending the Local Authority's assessment of the children's current and future welfare."

9. Baker J made an order in the following terms:

> "A UPON hearing counsel, Mr John Vater QC and Mr Edward Devereux for the Applicant local authority ("the local authority") without formal notice to the Respondents and by telephone through the emergency procedures set out in the relevant practice direction;
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> PENAL NOTICE
>
> TO: ASIF MALIK AND SARA KIRAN
>
> YOU MUST OBEY THE ORDERS AT PARAGRAPHS 2 AND 3 BELOW. IF YOU DO NOT, YOU WILL BE GUILTY OF CONTEMPT OF COURT AND YOU MAY BE FINED, SENT TO PRISON, OR YOUR ASSETS MAY BE SEIZED.
>
> B AND UPON THE COURT CONSIDERING the following:

(i) The applications for wardship orders making the children … wards of court pursuant to the inherent jurisdiction of the High Court;

(ii) The unsworn Affidavit of Sarah Castle, Solicitor and Principal of the Joint Legal Team, Reading Borough Council, Civic Offices, Bridge Street, Reading, Berkshire RG12LU dated 5 May 2015 in support of the applications;

C AND UPON THE COURT being informed, by way of the Affidavit of Sarah Castle from that the most up to date information about the mother, the father and the children is that they are either in a detention centre in Ankara, Turkey, awaiting transfer to Istanbul, or are in transit to Istanbul whence it is intended that they should be deported to Moldova by aeroplane

D AND UPON THE COURT PERMITTING the local authority to make these applications without formal notice to the Respondents, the court having been satisfied that the local authority was justified in applying without such notice in the urgent circumstances of this case

E AND UPON THE COURT DECLARING on the evidence presently before it and on a strictly provisional basis (given that this order is being made without formal notice to the Respondents) that:

(i) The courts of England and Wales have jurisdiction to consider the local authority's applications on the basis of Article 8 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (that is to say that as at the date the court is seised the children are habitually resident in England and Wales); and, further to E(i) above,

(ii) The courts of England and Wales have jurisdiction to consider the local authority's applications on the basis of the children's nationality (that is to say that the children are British nationals);

(iii) That by reason of the local authority's applications there are now "rights of custody" in the court for the purposes of the 1980 Hague Convention on the Civil Aspects of International Child Abduction;

F AND UPON THE COURT RESPECTFULLY REQUESTING THAT the courts of Turkey do decline to

exercise any jurisdiction in relation to matters of parental responsibility in respect of the children;

G AND UPON THE COURT RESPECTFULLY REQUESTING THAT all judicial, police, security, immigration and other authorities in Turkey do take all steps to cease the current plan to deport the family to Moldova, and to retain the family in the detention centre in Ankara where they have resided since about 20th April so that the proceedings now issued in England and Wales take place fairly and so that the mother, the father and the children can engage in and be properly assessed by the applicant Local Authority and so that they may engage in and be properly represented in these proceedings;

H AND UPON THE LOCAL AUTHORITY INFORMING THE COURT that its present intention is to arrange forthwith for its social workers to attend upon the family in Turkey in order to assess its circumstances, plans and in particular the wellbeing of the children;

I AND UPON THE COURT BEING SATISFIED THAT in the absence of these Orders the children are likely to suffer significant harm, and because it is in the best interests of the children, the court can and should make orders in respect of the children, and furthermore that such orders as are made below are a proportionate interference with the rights of the mother, the father and the children under Articles 6 and 8 of the 1950 European Convention on Human Rights (as incorporated into the law of England and Wales by the Human Rights Act 1998);

J AND AFTER this court considering that it must protect and secure the well being of the children so that they may be placed in a position where they may freely express their wishes and feelings as to their country and place of residence;

K AND UPON Sarah Castle, Solicitor and Principal of the Joint Legal Team, Reading Borough Council, Civic Offices, Bridge Street, Reading, Berkshire RG12LU undertaking to file an originating summons and sworn affidavit by 4pm today the court giving a short judgment today;

IT IS ORDERED THAT:

PURSUANT TO THE INHERENT JURISDICTION

1 The children shall be made wards of court during their minority and until further order to the contrary. For the avoidance of doubt, for the purposes of any foreign administrative or judicial authority considering this order, that

means that the children are, immediately upon this order being made, protected by the High Court of England and Wales and that no important step in their lives can be made without permission being granted by the High Court of Justice of England and Wales.

2 Sara Kiran and Asif Malik must cause or permit their children … to remain in the detention centre in Ankara, Turkey, at which they have been staying since 20th April 2015, until further Order or the Court's further hearing of this matter, listed on 8 May 2015 at 10.30am.

3 The mother and the father shall cooperate in and make the children available for an assessment of the family's circumstances, plans and well-being at the direction of the Local Authority;

4 This matter shall be listed before the President of the Family Division sitting in the Family Division at the Royal Courts of Justice, Strand, London WC2A 2LL on 8th May 2015 at 10.30am (time estimate, 30 minutes, subject to confirmation with the Clerk of the Rules), save that in the event that the children are returned to England and Wales prior to that date there shall be liberty to the solicitors for the local authority to apply to the Clerk to the President of the Family Division for an early hearing date.

5 Both the mother and the father **must** be represented at the hearing on [] or such other hearing date that is fixed by the solicitors for the local authority provided that such solicitors giving the father and the mother 24 hours written notice of such hearing date.

6 There shall be permission to disclose the papers in the case to any lawyers instructed by the father and the mother in England and Wales and in Turkey.

7 There shall be permission to disclose this order and the papers in the case to the following:

(i) The Foreign and Commonwealth Office;

(ii) The British Embassy in Turkey

(iii) The Central Authority for England and Wales;

(iv) The Central Authority for Turkey;

(v) The office of the Head of International Family Justice for England and Wales with a view to that office attempting to make contact with the Hague Network Judge for Turkey;

> 8 A penal notice directed to the mother and father shall be attached to paragraphs 2 and 3 of this order.
>
> 9 There shall be permission to the solicitors for the local authority to serve this order and the proceedings on the mother and father by email and by post to their last known address in England and Wales and through the Central Authority to England and Wales and the Central Authority to Turkey.
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> AND THE COURT FURTHER DIRECTS:
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> 10 The Foreign and Commonwealth Office by a Principal Officer or Principal Lawyer shall be invited to by 4pm on 7th May 2015 provide a letter to the court (to the clerk to the President of the Family Division) detailing what assistance the Foreign and Commonwealth Office are able to provide to assist in the return of the children to England and Wales including what further directions, if any, they would be assisted by in liaising with the Turkish authorities, and in the event that they are unable to assist, to set out their reasons for this, and any other course they suggest to assist in the return of the children to England and Wales.
>
> 11 There shall be liberty to the Foreign and Commonwealth Office to apply to the President of the Family Division (on one working days notice to the solicitors for the local authority) to vary or to discharge paragraph 10 of this order.
>
> AND THE COURT FURTHER RESPECTFULLY REQUESTS THAT
>
> 12 Any person not within the jurisdiction of this court who is in a position to do so to cooperate in assisting and securing the directed assessment of the children who are now wards of the High Court of Justice (Family Division) of England and Wales.
>
> 13 All judicial, administrative and law enforcement authorities in Turkey use their best endeavours to assist in taking any steps which may to them appear necessary and appropriate in facilitating the assessment directed herein."

10. The central parts of that order follow in substance the form of order first used, so far as I am aware, by Singer J in *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542 (see the form of order at 546).

11. I have seen the Note of the hearing before Baker J prepared by Mr Vater and approved by the judge. This records the judge's decision as being that:

> "he was satisfied on the basis of the information provided that (1) it was an appropriate case to permit the local authority to apply without notice to the parents; (2) it appeared that the court had jurisdiction to make orders in wardship either because the children are habitually resident in this country or as a result of their British nationality; (3) unless the court made protective orders the children were likely to suffer significant harm; (4) in all the circumstances, the children's welfare would be best served if they remained in the detention centre in Turkey pending the proposed assessment, or at least until a further hearing later this week when the matter could be considered by the court on notice to the parents."

12. As it happened, Mr Vater was appearing in front of me that day in another case. Baker J was sitting on circuit. So when the need arose for Mr Vater to seek further relief from the court – it had been discovered that, despite Baker J's order, the family was leaving Turkey and travelling to Moldova by air – it was appropriately to me that the application was directed.

13. At 12.59pm, Mr Vater forwarded to me an email interchange between the local authority, the FCO and Her Majesty's Ambassador in Moldova. In an email timed at 12.52pm, the relevant official in the FCO wrote as follows to the local authority:

> "I forwarded the court order to our Ambassador in Moldova who has replied with some good news (see below). I will find out who should be your point of contact to arrange assessment by your social workers and let you know as soon as I can."

The email from the Ambassador read as follows:

> "As promised I spoke to the Prime Minister's special adviser on Law and Order matters, D. He confirmed that he had alerted the Head of the Border Police, P, and they will keep the children/ family in detention on arrival should they be on the plane this afternoon from Istanbul.
>
> I said that the UK social workers were on their way to Turkey and, if required, would come here to assess the condition of the children so that shouldn't be too long. D was fine with this saying that they would do whatever was necessary and that we could count on their full cooperation. But he said that obviously if they were here for any length of time then we would need to involve the Head of the Bureau for Migration and the MFA.
>
> If you could let us know when you have confirmation of whether the family boarded the flight to Chisinau at 1500 today or not, we can then let P and D know."

14. Mr Vater followed this up with an email sent to me at 1.25pm:

> "You are now as I understand it appraised of the rapidly developing situation in this case. Having considered matters and having received an indication from the Moldovan authorities that they are willing to cooperate, I attach hereto an Order we invite the Court to make this afternoon, as soon as practicable.
>
> The Order is effectively the same as that made by Baker, J. earlier today, but directed at the Moldovan authorities (Moldova is a Hague signatory) with the addition that upon landing the parents must deliver up the relevant passports to the British Consular authorities to be held to the Court's Order.
>
> The Local Authority's case remains the same, in that we seek a proportionate response to a situation in which it appears that the family is, as it were, 'in flight' from the UK. It does seem to us that in view of the parents' obvious refusal to return to the UK, a proportionate response is to seek their urgent cooperation with an assessment in order that their plans for the children may be clearer to us, and about which reasoned decisions may be taken. Social workers were on their way to Turkey for that purpose; we are now looking into diverting them to Moldova. The flight is due to arrive in Moldova at 17:10, which is we think 15:10 UK time."

15. Mr Vater appeared before me at 2pm. Time was plainly of the essence, for the flight to Moldova was due to land in a little over one hour's time. The Press Association's reporter, Mr Brian Farmer, was present, as he was entitled to be, even though I was sitting in private. For reasons which are obvious, and to which I shall return below, it was important that there should be, at least for the time being, no reporting either of the fact that there were now court proceedings on foot or of the terms of any order I might make. On the other hand, this was absolutely no reason for excluding Mr Farmer from the hearing (not that this was something sought by Mr Vater). On the contrary, if there was any question of my making a reporting restriction order of the kind I had in mind that was a very powerful reason for *not* excluding the media's representative. I thought it important that Mr Farmer should be permitted to remain in court. But at the beginning of the hearing, and without any objection from Mr Farmer, I made an order that there was to be no reporting of the hearing. I said:

> "Mr Farmer is entitled to be present unless I exclude him. The matter is urgent, and we do not, I am afraid, have time to debate the ins and outs of it. Mr. Farmer, what I am going to do is say that you can remain, but I am imposing a reporting restriction order that unless and until I make some further direction nothing which is about to be put to me is to be reported, even if anonymously."

Mr Farmer replied: "I quite understand."

16. Hayden J was recently faced with a similar issue in a case in which the wardship jurisdiction was being invoked to prevent various children leaving the country to travel to Syria: *The London Borough of Tower Hamlets v M and ors* [2015] EWHC 869 (Fam). He said (para 18(vi)):

> "Justified interference with the article 8 rights of a minor will always require public scrutiny at some stage in the process. In both cases this week, the press attended. It was only necessary for them to withdraw on one occasion, at the request of a very senior police officer present in court, supported by the local authority. The request was made because sensitive issues of policy and national security arose. Transparency, that is to say the attendance of accredited press officials in court, remains the presumption here, as it now is in all aspects of the work of the family justice system".

I agree.

17. I proceeded to make the order as sought by Mr Vater in the following terms:

> "A. UPON hearing counsel, Mr John Vater QC for the Applicant local authority ("the local authority") without formal notice to the Respondents
>
> PENAL NOTICE
>
> TO: SARA KIRAN AND ASIF MALIK
>
> YOU MUST OBEY THE ORDERS AT PARAGRAPHS 2, 3 AND 4 BELOW. IF YOU DO NOT, YOU WILL BE GUILTY OF CONTEMPT OF COURT AND YOU MAY BE FINED, SENT TO PRISON, OR YOUR ASSETS MAY BE SEIZED.
>
> B AND UPON THE COURT CONSIDERING the following:
>
> (i) The applications for wardship orders making the children … wards of court pursuant to the inherent jurisdiction of the High Court;
>
> (ii) The Affidavit of Sarah Castle dated 5th May 2015 in support of the applications;
>
> C AND UPON THE COURT being informed that the most up to date information about the mother, the father and the children is that they are in transit to Istanbul whence it is intended that they should be deported to Moldova by aeroplane
>
> D AND UPON THE COURT PERMITTING the local authority to make these applications without formal notice to the Respondents, the court having been satisfied that the local

authority was justified in applying without such notice in the urgent circumstances of this case

E AND UPON THE COURT DECLARING on the evidence presently before it and on a strictly provisional basis (given that this order is being made without formal notice to the Respondents) that:

(i) The courts of England and Wales have jurisdiction to consider the local authority's applications on the basis of Article 8 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (that is to say that as at the date the court is seised the children are habitually resident in England and Wales); and, further to E(i) above,

(ii) The courts of England and Wales have jurisdiction to consider the local authority's applications on the basis of the children's nationality (that is to say that the children are British nationals);

(iii) That by reason of the local authority's applications there are now "rights of custody" in the court for the purposes of the 1980 Hague Convention on the Civil Aspects of International Child Abduction;

F AND UPON THE COURT RESPECTFULLY REQUESTING THAT the courts of Moldova do decline to exercise any jurisdiction in relation to matters of parental responsibility in respect of the children;

G AND UPON THE COURT RESPECTFULLY REQUESTING THAT all judicial, police, security, immigration and other authorities in Moldova do take all steps to retain the family upon its arrival in Moldova, on the 17:10 arrival from Istanbul to Chisinau until further Order of this Court for the purposes of permitting access to the family and the children of social workers from the Local Authority;

H AND UPON THE LOCAL AUTHORITY INFORMING THE COURT that its present intention is to arrange forthwith for its social workers to attend upon the family in Moldova in order to assess its circumstances, plans and in particular the wellbeing of the children;

I AND UPON THE COURT BEING SATISFIED THAT in the absence of these Orders the children are likely to suffer significant harm, and because it is in the best interests of the children, the court can and should make orders in respect of

the children, and furthermore that such orders as are made below are a proportionate interference with the rights of the mother, the father and the children under Articles 6 and 8 of the 1950 European Convention on Human Rights (as incorporated into the law of England and Wales by the Human Rights Act 1998);

J AND AFTER this court considering that it must protect and secure the well being of the children so that they may be placed in a position where they may freely express their wishes and feelings as to their country and place of residence;

K AND AFTER the court giving a short judgment today;

IT IS ORDERED THAT:

PURSUANT TO THE INHERENT JURISDICTION

1 The children shall be made wards of court during their minority and until further order to the contrary. For the avoidance of doubt, for the purposes of any foreign administrative or judicial authority considering this order, that means that the children are, immediately upon this order being made, protected by the High Court of England and Wales and that no important step in their lives can be made without permission being granted by the High Court of Justice of England and Wales.

2 Sara Kiran and Asif Malik must cause or permit their children … to remain in Moldova, at the direction of the Moldovan Border police, upon their arrival in Moldova (at 17:10 on a flight from Istanbul to Chisinau) until further Order or the Court's further hearing of this matter on Friday 8th May 2015 at 10.30am;

3 As soon as they arrive in Moldova, Asif Malik and Sara Kiran must deliver their passports, via the Moldovan Border Police if necessary, to representatives of the British Consulate to be held by them at the Court's direction and until further Order;

4 The mother and the father shall cooperate in and make the children available for an assessment of the family's circumstances, plans and well-being at the direction of the Local Authority;

5 This matter shall be listed before the President of the Family Division sitting in the Family Division at the Royal Courts of Justice, Strand, London WC2A 2LL on 8 May 2015 at 10.30am (time estimate, 30 minutes, subject to confirmation with the Clerk of the Rules), save that in the event that the

children are returned to England and Wales prior to that date there shall be liberty to the solicitors for the local authority to apply to the Clerk to the President of the Family Division for an early hearing date.

6 Both the mother and the father **must** be represented at the hearing on 8th May 2015 or such other hearing date that is fixed by the solicitors for the local authority provided that such solicitors giving the father and the mother 24 hours written notice of such hearing date.

7 There shall be permission to disclose the papers in the case to any lawyers instructed by the father and the mother in England and Wales and in Moldova.

8 There shall be permission to disclose this order and the papers in the case to the following:

(i) The Foreign and Commonwealth Office;

(ii) The British Embassy in Moldova;

(iii) The Central Authority for England and Wales;

(iv) The Central Authority for Moldova;

(v) The office of the Head of International Family Justice for England and Wales with a view to that office attempting to make contact with the Hague Network Judge for Moldova;

9 A penal notice directed to the mother and father shall be attached to paragraphs 2, 3 and 4 of this order.

10 There shall be permission to the solicitors for the local authority to serve this order and the proceedings on the mother and father by email and by post to their last known address in England and Wales and through the Central Authority to England and Wales and the Central Authority to Moldova.

AND THE COURT FURTHER DIRECTS:

11 The Foreign and Commonwealth Office by a Principal Officer or Principal Lawyer shall be invited to by 4pm on 7th May 2015 provide a letter to the court (to the clerk to the President of the Family Division) detailing what assistance the Foreign and Commonwealth Office are able to provide to assist in the return of the children to England and Wales including what further directions, if any, they would be assisted by in liaising with the Moldovan authorities, and in the event that they are unable to assist, to set out their reasons for this, and

> any other course they suggest to assist in the return of the children to England and Wales.
>
> 12 There shall be liberty to the Foreign and Commonwealth Office to apply to the President of the Family Division (on one working days notice to the solicitors for the local authority) to vary or to discharge paragraph 10 of this order.
>
> AND THE COURT FURTHER RESPECTFULLY REQUESTS THAT
>
> 13 Any person not within the jurisdiction of this court who is in a position to do so to cooperate in assisting and securing the directed assessment of the children who are now wards of the High Court of Justice (Family Division) of England and Wales.
>
> 14 All judicial, administrative and law enforcement authorities in Moldova use their best endeavours to assist in taking any steps which may to them appear necessary and appropriate in facilitating the assessment directed herein."

18. Given the imperative necessity to have the order sealed and transmitted to Moldova within what by now was less than one hour, there was time for me to give only the most exiguous of judgments. I said this:

> "… this is a case where all the evidence would strongly suggest that until they were stopped by the Turkish authorities these young children, who are, of course, completely under the control of their parents, were intended by their parents to go through the middle of a war zone … That being so the court's first priority must be to ensure their safety. The order, if I may say so, has been very cleverly and carefully crafted … so as to avoid separation, but it is a rapidly developing situation and it seems to me that the priority is to make this order in the terms sought …
>
> I am not going to give a judgment, except I will simply say that having read the draft affidavit of Miss Castle, the witness statement of the Detective Inspector and the order made by Mr Justice Baker early this morning, and bearing in mind the information which has been transmitted to me very appropriately and helpfully by you in the form of emails, I am entirely satisfied that this is a case in which the court must, although the children are abroad, exercise its wardship jurisdiction for the purpose of protecting them. The children, on the evidence, are British subjects and are therefore amenable to the wardship jurisdiction wherever they may be, and so the fact that they are no longer in the jurisdiction is neither here nor there.

> On the evidence and given the historical circumstances, it being clear the children were habitually resident in this country until as recently as less than four weeks ago, I am fully justified in making the order you seek containing recitals to the effect that, on the evidence before the court and on a strictly provisional basis, this court has jurisdiction on the basis of the children's habitual residence …
>
> I do not propose, in the circumstances, to say anything more at this stage. The pressing imperative, since we wish to intercept the children when they arrive in Moldova at 17.10 local time (15.10 UK time) is for the order I have made to be sealed without further delay. I say that, looking at the clock, bearing in mind it is now 2.15."

19. Late at night the following day, 6 May 2015, Mr Vater emailed me as follows (at 11.11pm):

> "The children arrived in Moldova and were held with their parents in accordance with the Order (attached). Also in accordance with the Order, the passports are held at the Court's direction by the British Consul.
>
> I am very pleased to say that the social workers found the children safe and well, and their parents completely cooperative. They have agreed to return to the UK with their children on a flight into Stansted arriving at 15:10 UK time tomorrow. They will be accompanied by the social workers and arrangements are being made for the whole family to be accommodated together whilst plans are made in cooperation with them. I ought also to mention the extremely hard and effective work of the Ambassador and Consul in cooperation with the Moldovan authorities which have been unfailingly cooperative up to the highest levels of Government.
>
> The issue which arises is the Order (attached) currently directs the British authority in Moldova to retain the passports to the Court's Order; and also the FCO is directed to file evidence relating to the children's return (para 11). Events have now moved on and the Consulate is telling us they need paras 11 and 12 discharged, and a variation of para 3 as follows:
>
> > 'the representatives of the British Consulate in possession of the passports pursuant to paragraph 3 of the Order of 5th May 2015 have permission to deliver the passports to the social workers accompanying the family during its return to the UK. Thereafter, the passports must be retained by the Applicant Local Authority until further Order of the Court.'
>
> I have spoken to both the Ambassador and Consul this evening and they are content simply to be told by telephone that you are

> willing to make that Order. Because of the need to get the family onto the flights, those Orders need to be made (according to the Consul) by about 10.30 at the latest. In those circumstances I felt it necessary to ask if you would deal with the matter by email. In the event that, for unforeseeable reasons, that Order cannot be made in time, I have taken the view that the Consul should simply hand the passports to the social workers for them to hold for the time being, and I will apply for a retrospective variation. I have said so for pragmatic reasons which intend no disrespect to the Court. It is obviously important in these circumstances that the family returns by agreement.
>
> After the family's arrival in the UK the plan is, in view of their total cooperation so far, to keep them together but to ensure that for the time being at least they are accommodated in a safe and neutral environment, protected from the inevitable external pressures.
>
> We hope to file and serve (with your leave) some short evidence about our plans before Friday's hearing."

20. Mr Vater appeared before me and I made an order in the terms requested shortly before 10.30am the next day, Thursday 7 May 2015.

21. In accordance with paragraph 4 of the order made by Baker J on 5 May 2015, the matter returned before me on the morning of Friday 8 May 2015. The local authority was represented by Mr Vater. The parents were present, represented by Ms Tina Villarosa. Officers of the Thames Valley Police (TVP) and the South East Counter Terrorism Unit were present; TVP was represented by the force solicitor, Miss Ciaran Gould. Mr Vater's application was supported by statements from the local authority's Head of Service and from the local authority's social worker who had assessed the family in Moldova, which there is no need for me to refer to further in this judgment.

22. At the end of a short hearing I made the following order by consent:

> "UPON HEARING Leading Counsel for the Local Authority, Counsel for the parents, and Solicitor for the Thames Valley Police;
>
> AND UPON the Court indicating that the Chief Constable of the Thames Valley Police should not hesitate to indicate if any Order, Directions or step in these proceedings raises or is likely to raise any potential issue of PII, or impinges upon any operational matter such that it might compromise any active investigation;
>
> AND UPON the Local Authority indicating its gratitude towards the parents for their willingness to co-operate and assuring the Court and the parents of its intention to continue to

> work in partnership with these parents to assess and safeguard the welfare of the children;
>
> AND UPON the Court indicating its approval for release to the Press Association of the agreed 'statement' attached hereto:
>
> AND UPON the Court indicating its gratitude towards Miss Gould, Force Solicitor of Thames Valley Police (TVP); DCI Doak of TVP; DI Horsburgh and DC Taylor of the South East Counter Terrorism Unit for their attendance today and assistance in these proceedings;
>
> AND BY CONSENT IT IS ORDERED AND DIRECTED THAT:
>
> 1 The children shall remain Wards of Court during their minority and until further Order to the contrary;
>
> 2 The Local Authority must retain the parents' and children's passports until further Order to the contrary;
>
> 3 CAFCASS (notice of these proceedings having already been given) shall appoint a Guardian for the children forthwith;
>
> 4 By 4.00pm on 27 May 2015, the Local Authority must file and serve (if so advised) its Part 25 application for the instruction of a forensic expert;
>
> 5 This matter is listed for a Case Management Hearing (at which it is anticipated that a final hearing window will be identified) on 2 June 2015, at 2.00pm time estimate 1 hour;
>
> 6 Any further application in this matter is reserved to the President."

I draw attention to what is said in the third recital.

23. I indicated that I would in due course hand down a judgment explaining what had happened and why I had made these various orders. I said that in the meantime the reporting restriction order should remain in force.

24. Mr Farmer, who had been present during the hearing, had helpfully suggested that it would be appropriate for a brief statement to be made, in a form approved by me, explaining what had happened. I approved the following statement, in the agreed terms which were put before me:

> "Statement:
>
> The President of the Family Division of the High Court confirms that the Malik family has returned to the jurisdiction of England and Wales. The family is safe and well. The children are wards of court and the family continues to be

> supported by appropriate social care services, whilst the Family Court continues to ensure the welfare of the children in co-operation with their parents. Police enquiries will continue in the meantime."

25. I have deliberately dealt with the events from 5 to 8 May 2015 in some detail. My reasons are five-fold:

    i) First, in a case that had already attracted media attention it was important that the public should know what had happened, and why.

    ii) Secondly, it is important that the public should be able to understand, and I trust appreciate, just how quickly, effectively and flexibly the family courts are able to respond, if need be outside normal court hours, in urgent cases and where events may, as here, be changing 'on the ground' very rapidly but far away. There is always, every minute of every day and night throughout the year, a judge of the Family Division on duty, 'out of hours', to deal with cases so urgent that they cannot wait. This case, I believe, shows the system working well. The court became involved in the early morning of Tuesday 5 May. The children had returned to this country by the middle of the afternoon of Thursday 7 May. For another example of the family court system working as it should and reacting promptly to rapidly changing circumstances see *Re Ashya King (A Child)* [2014] EWHC 2964 (Fam).

    iii) Thirdly, I wish to place on record my gratitude and thanks, as recited in the order I made on 8 May 2015, for the assistance afforded by the police. In the *Tower Hamlets* case, Hayden J drew attention (para 18(ix)) to "The importance of coordinated strategy, predicated on open and respectful cooperation between all the safeguarding agencies involved". He went on to observe (para 58) that "only open dialogue, appropriate sharing of information, mutual respect for the differing roles involved and inter-agency cooperation is going to provide the kind of protection that I am satisfied that the children subject to these applications truly require." I agree with all of that. The present case is a clear demonstration of just how effective the good inter-agency cooperation which was so evident here can be.

    iv) Fourthly, I wish to place on record my gratitude and thanks for the prompt and unstinting assistance the court has received from the FCO, from the Ambassador and from the Consular authorities in both Turkey and Moldova. Here, as so often in so many other fields of international family law, the court's concern for a child's welfare requires the ready, and on occasions speedy, cooperation and assistance of the FCO and its officials if the child's welfare is to be safeguarded and the court's plans for the child brought to fruition. In this as in so many other cases down the years the court has been able to turn with confidence to King Charles Street for prompt and effective assistance.

    v) Finally, and most important of all, I wish to place on record my gratitude and thanks, as President of the Family Division of Her Majesty's High Court of Justice and Head of Family Law in England and Wales, for the prompt

> assistance the court has received from the public authorities of the Republic of Moldova. The Republic is a sovereign state within which, of course, I have no authority at all. The English court must always be astute to ensure that no order it makes could possibly be construed as an interference with the sovereign rights of another State. These are matters to be dealt with in accordance with the well-established principles of international comity between friendly States. That is why the order I made was deliberately expressed in terms of this court "respectfully requesting" the assistance of the various public authorities in Moldova to which I referred. I am, as I have said, very grateful for the assistance afforded to the English court by the Republic of Moldova.

26. I turn to the two legal issues which I have mentioned.

The use of the wardship jurisdiction

27. The local authority has turned to the court inviting its assistance and proposing recourse to the inherent jurisdiction, to wardship. That requires consideration of section 100 of the Children Act 1989. There was, in my judgment, reasonable cause to believe that, if the court's inherent jurisdiction was not exercised, the children were likely to suffer significant harm, as that expression is defined in section 31 of the 1989 Act: see section 100(4)(b) of the Act. I had no doubt that this is a case in which I should give the local authority leave in accordance with section 100(3) of the Act. I was satisfied that each of the conditions in section 100(4) is met. Quite plainly I should exercise my powers under the inherent jurisdiction. The questions was, can I and if so how?

28. In the circumstances it was clear to me that, in principle, wardship, if available, was the most appropriate mechanism for the court to adopt, at least until such time as the court was in a position, following the children's return to this country, to explore all the available options. As Hayden J said in the *Tower Hamlets* case (para 9), it is particularly apposite in cases such as these.

29. The Crown – I put the matter generally and without descending into detail or identifying any qualifications to what I am about to say – has a protective responsibility for its subjects wherever they may be, whether in this country or abroad. The correlative of this, as both Casement and Joyce ultimately discovered to their cost, is the subject's duty of allegiance to the Crown wherever he may be, whether in this country or abroad: see *The King v Casement* [1917] 1 KB 98 and *Joyce v Director of Public Prosecutions* [1946] AC 347. As Darling J said in *Casement* (page 137), "the subjects of the King owe him allegiance, and the allegiance follows the person of the subject. He is the King's liege wherever he may be".

30. Now the significance of this in the present case – I say nothing whatever of its significance (if any) in relation to the children's parents – is that the Crown's protective duty, as *parens patriae*, in relation to children extends, in the case of a child who is a British subject, to protect the child wherever he may be, whether in this country or abroad.

31. Thus, as is well recognised in the authorities, the court may make a child who is a British subject a ward of court even if the child, at the time the order is made, is outside the jurisdiction: see *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] AC 1, paras 60-65, 70, referring to various authorities including *Re B, RB v FB and MA (Forced Marriage: Wardship: Jurisdiction)* [2008] EWHC 1436 (Fam), [2008] 2 FLR 1624 and *Re N (Abduction: Appeal)* [2012] EWCA Civ 1086, [2013] 1 FLR 457. Other examples, seemingly not cited to the Supreme Court, of the warding of a child who is a British subject, at a time when the child is outside the jurisdiction, can be found in *In re Liddell's Settlement Trusts* [1936] Ch 365 (see the facts as summarised by Slesser LJ at 369) and, more recently, in *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542 (see the facts at 544 and the form of order at 546). For the corresponding exercise of jurisdiction by the old Probate, Divorce and Admiralty Division see *Harben v Harben* [1957] 1 WLR 261.

32. Recognising that for all the reasons articulated in *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951, para 42, and, more recently, in *Re N* and in *A v A*, there is need for "extreme circumspection in deciding to exercise the jurisdiction", I have no doubt that the jurisdiction was properly exercised in both *Re KR* and *Re B*, just as I have no doubt that it can properly be exercised in the circumstances with which I am here faced. This is not the occasion, and there is no need for me, to explore the range of circumstances in which it may be appropriate to make a child who is outside the jurisdiction a ward of court. I merely observe that cases such as this demonstrate the continuing need for a remedy which, despite its antiquity, has shown, is showing and must continue to show a remarkable adaptability to meet the ever emerging needs of an ever changing world. I add that the use of the jurisdiction in cases where the risk to a child is of harm of the type that would engage Articles 2 or 3 of the Convention – risk to life or risk of degrading or inhuman treatment – is surely unproblematic. So wardship is surely an appropriate remedy, even if the child has already left the jurisdiction, in cases where the fear is that a child has been taken abroad for the purposes of a forced marriage (as in *Re KR* and *Re B*) or so that she can be subjected to female genital mutilation or (as here) where the fear is that a child has been taken abroad to travel to a dangerous war-zone. There is no need for me to go any further, so I need not consider whether there are other kinds of situation where a child who is already abroad should be made a ward of court or whether wardship is an appropriate remedy where the risk to the child is of harm falling short of harm of the type that would engage Articles 2 or 3 of the Convention.

33. In the *Tower Hamlets* case, Hayden J recognised (para 11) that the relief he was being asked to grant arose in circumstances without recent precedent, but rightly saw that as no obstacle. He said (paras 57-58), and I entirely agree:

> "57 The family court system, particularly the Family Division, is, and always has been, in my view, in the vanguard of change in life and society. Where there are changes in medicine or in technology or cultural change, so often they resonate first within the family. Here, the type of harm I have been asked to evaluate is a different facet of vulnerability for children than that which the courts have had to deal with in the past.

> 58 What, however, is clear is that the conventional safeguarding principles will still afford the best protection."

34. For these reasons, I concluded, therefore, that I had jurisdiction to make the children wards of court, because they are British subjects, notwithstanding the fact that they were at the time out of the jurisdiction.

35. Having jurisdiction, it was plain that I must exercise it, for the children's future welfare demanded imperatively that I do so. And in exercising the jurisdiction, I sought to apply the well known words of Lord Eldon LC in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, at 18:

> "it has always been the principle of this court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done."

These words are as apposite today as they were over 180 years ago: see *M v B, A and S (By the Official Solicitor)* [2005] EWHC 1681 (Fam), [2006] 1 FLR 117, para 108, and *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, para 103.

36. I add that the application to me was appropriately made ex parte (without notice) because, to quote the words I used in *X Council v B (Emergency Protection Orders)* [2004] EWHC 2015 (Fam), [2005] 1 FLR 341, para 53, "there are compelling reasons to believe that the child's welfare will be compromised if the parents are alerted in advance to what is going on." The point is obvious: if the parents were alerted to what the court was doing, the chance that they would return the children voluntarily must have been significantly diminished.

37. There is one final point I must emphasise in this connection. It is the point made by Hayden J in the *Tower Hamlets* case (para 18(iv)):

> "All involved must recognise that in this particular process it is the interest of the individual child that is paramount. This cannot be eclipsed by wider considerations of counter terrorism policy or operations, but it must be recognised that the decision the court is being asked to take can only be arrived at against an informed understanding of that wider canvas."

<u>The reporting restriction order</u>

38. I turn to the question of the grant of a reporting restriction order (RRO).

39. It is plain, if only for the reasons already canvassed in a related context above, that there had to be some restrictions, at least for the time being, on the publication of information about these proceedings. The question was what form those restrictions should take, not least given the amount of material which was already in the public domain.

40. As I have already mentioned, there was, in the public domain, a story which has already attracted some interest. It was the story of how the parents and the children

went to Turkey and what had happened to them since. But I was concerned with a completely different story. It was the story of the steps which the court and the local authority were taking or proposing to take to safeguard the children's welfare here and abroad. *This story*, in contrast to the other story, was not in the public domain, nor should it have been allowed at that stage to enter the public domain.

41. A RRO *contra mundum* in the form of RRO which has long been familiar in this Division would not, in my judgment, have been appropriate or indeed effective to achieve what was desired. After all, what an RRO in that form does is, in essence, to permit a story to be published, though only *in anonymised form*, whilst what was needed here was an, albeit temporary, prohibition on publication of the story altogether. For, however anonymised the story might be, there was a very real risk that the parents, either directly or having been alerted by friends, relatives or associates, would realise that the anonymous story was in fact about them – in which case the order of the court would be frustrated.

42. In short, what was needed here was not an RRO in the usual form but what, at least in other Divisions, is called an anti-tipping-off order: see *LNS v Persons Unknown* [2010] EWHC 119 (QB), [2010] 1 FCR 659, paras 24, 137-142, *DFT v TFD* [2010] EWHC 2335 (QB), paras 6, 10, and, generally, the *Report of the Committee on Super-Injunctions* published in May 2011.

43. For an illuminating description I can go to the *Report*, paras 2.20-2.21 (citations omitted):

> "2.20 A non-disclosure or anti-tipping-off order prohibits the publication or disclosure of the fact of the proceedings, and any order, made for a short period to ensure that the purpose of the order is not frustrated through publicity. Such an order contains what can be characterised as the super-injunction element. Examples of such orders in the context of civil proceedings are, for instance, search orders … and freezing injunctions. In such cases, temporary secrecy is essential in order to ensure that alleged wrongdoers are not tipped-off to the order's existence, which would then enable them to frustrate its primary purpose. As Lord Judge CJ put it, where, for instance, 'a defendant is committing fraud, and you believe that he has a number of associates, an order preventing him from reporting the fact that an injunction (that is to say a freezing injunction) [is] issued against him . . . because without it, he would be able to inform his dishonest colleagues, and they would immediately take steps to hide away assets. Once the order is served, and by their very nature such orders are served as soon as practicable, and its purpose carried into effect, the secrecy provisions lapse.
>
> 2.21 In the context of family justice, non-disclosure orders are a well-established means to prevent tipping-off in proceedings concerning the location of missing children. Again, tipping-off in such cases would frustrate the purpose of such proceedings. Temporary secrecy via non-disclosure of the

> fact of proceedings and the order is thus an essential feature of the proper administration of justice in such cases."

44. Reference was made in the *Report* to my judgment in *Re HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam), [2010] 2 FLR 1057, paras 36-37, where I said this:

> "[36] It has long been recognised that, quite apart from any statutory jurisdiction … the Family Division has an inherent jurisdiction to make orders directed to third parties who there is reason to believe may be able to provide information which may lead to the location of a missing child. Thus orders can be made against public authorities … requiring them to search their records with a view to informing the court whether they have any record of the child or the child's parent or other carer. Similar orders can be directed to telephone and other IT service providers, to banks and other financial institutions, to airline and other travel service providers … and to relatives, friends and associates of the abducting parent …
>
> [37] Since, for obvious reasons, it is important that the abducting parent is neither alerted to the investigations being carried out by the court nor informed of the identities of those from whom information is being sought nor informed of their answers, such orders are almost invariably made, and oral evidence taken, at hearings held in private from which the abducting parent's representatives are excluded and of which, typically, they will be wholly unaware, the applications being made ex parte and without notice. Moreover, and for the same reason, the orders themselves typically provide that they are not to be served on the abducting parent, just as they typically forbid those to whom the order is directed from informing the abducting parent of the existence of the order. Accordingly, and for reasons which in the nature of things are compelling, this small, discrete and necessarily discreet part of the Family Division's jurisdiction is, in distinction to the vast bulk of the Division's work, carried on not merely in private but typically in secret. The justification is that explained by Sir John Donaldson MR in *R v Chief Registrar of Friendly Societies ex parte New Cross Building Society* [1984] QB 227, [1984] 2 WLR 370 at 235 and 376 respectively, namely that unless it adopts this particular procedure in this particular type of case the court will be unable to achieve its paramount object of doing justice according to law; for abjuring secrecy in such circumstances is likely to lead, directly or indirectly, to a denial of justice and, not least, justice for the innocent child."

45. The Report continued (para 2.22):

> "Whether made in civil, criminal or family proceedings, the temporary secrecy provided by a non-disclosure order is required and justified where, without it, the court would not be capable of fulfilling its primary constitutional duty of doing justice … The use of non-disclosure orders in such cases is entirely sensible, justified and unobjectionable as long as, and only insofar as, they provide a form of short-lived, temporary, secrecy which lasts no longer than strictly necessary."

The *Report* emphasised (para 3.7) that an anti-tipping-off order must be "kept under active and close scrutiny by the court".

46. Following publication of the *Report*, Lord Neuberger MR issued *Practice Guidance: Interim Non-Disclosure Orders* [2012] 1 WLR 1003, which is reproduced in the 2015 White Book, Vol 1, paras B13-001 et seqq. It includes a Model Order, paragraph 7 of which ("Only to be granted in an exceptional case where a reporting restriction order is strictly necessary") is in the following terms:

> "Until service of the Order / the return date / [ ] the Defendants must not use, publish or communicate or disclose to any other person the fact or existence of this Order or these proceedings and the Claimant's interest in them, other than:
>
> (a) by way of disclosure to the Defendants' legal advisers for the purpose of obtaining legal advice in relation to these proceedings; or
>
> (b) for the purpose of carrying this Order into effect."

Paragraph 14 of the Model Order ("Only to be granted in an exceptional case where hearing the application in private is strictly necessary") is in the following terms:

> "The Judge considered that it was strictly necessary, pursuant to CPR r 39.2(3)(a),(c) and (g), to order that the hearing of the Application be in private and there shall be no reporting of the same."

47. Plainly, in my judgment, an anti-tipping-off order was required in the present case. It was necessary, indeed essential, if the court's objective, an objective directed to the children's welfare, was not to be frustrated.

48. The order I made was directed solely – and, I stress, only for a limited period – to the reporting of the current proceedings before the court. Nothing in the order I made restricted in any way the repetition of material that was already in the public domain before the proceedings were commenced. Nor, I emphasise, did it restrict in any way the continued reporting of the story of how the parents and the children went to Turkey or what had happened to them since, there or elsewhere.

49. Now that the children have returned to the jurisdiction, there is no continuing reason for maintaining the RRO. It has served its purpose. It no longer has any function. It must accordingly be discharged.

The future

50. The order I made on 8 May 2015 contained, as we have seen, directions as to the future of these proceedings. The proceedings will continue in private, though in due course I shall give a further judgment dealing with future events.