Neutral Citation Number: [2015] EWCA Civ 26

Case No: B4/2014/2445, 2447 & 2499

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY DIVISION OF THE HIGH COURT (PRINCIPAL REGISTRY)
MRS JUSTICE ROBERTS
FD14P00628

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2015

Before :

LORD JUSTICE RICHARDS
LADY JUSTICE BLACK
and
LORD JUSTICE RYDER

- -

RE M (REPUBLIC OF IRELAND) (CHILD'S OBJECTIONS) (JOINDER OF CHILDREN AS PARTIES TO APPEAL)

- -

Mr Christopher Hames & Ms Dorothea Gartland (instructed by **Freemans**) for the **1st & 2nd Appellants**
Ms Ruth Kirby (instructed By **Co-operative Legal Services)** for the **3rd Appellant**
Mr James Turner QC & Ms Mehvish Chaudhry (instructed by **Williscroft & Co**) for the Respondent

Hearing dates: 4th & 5th November 2014

- -

Approved Judgment

Black LJ:

1. This is an appeal from a decision made by Mrs Justice Roberts on 18 June 2014 in proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the 1980 Convention").

2. The proceedings concern three children. They are J (born in December 2001 and now 13 years old), T (born in November 2003 and 11), and I (born in June 2008 and 6).

3. On the application of the children's father ('the father'), Mrs Justice Roberts ordered the return of the children to the Republic of Ireland. At first instance, the only parties to the proceedings were the father and the children's mother ("the mother") who had brought them to this country on 12 March 2014 and who resisted the father's application on two bases arising under Article 13 of the 1980 Convention, namely the Article 13b) and the child's objections exceptions.

4. The children have an older brother, D, who had his 17th birthday in December 2014 and was 16 at the time of the proceedings before Mrs Justice Roberts. By virtue of his age, he was not the subject of a Hague Convention application. However, following Mrs Justice Roberts' decision, he and J consulted a solicitor and applications were made on their behalf to the Court of Appeal for permission to appeal against her order. The applications came before me on paper on 24 July 2014, as a matter of urgency, when the return order was just about to become operative. I granted J permission to appeal and, taking a course which is exceptional for appeal proceedings, listed the case for directions on 30 July 2014.

5. The directions hearing was attended by counsel for J and D (Mr Hames), counsel for the mother (Ms Kirby), and leading and junior counsel for the father (Mr Turner QC and Ms Chaudhry).

6. I granted permission to D and the mother to appeal and gave directions with a view to the appeal being heard promptly, although for various reasons it was not heard as quickly as I would have liked. In addition to the substantive issues concerning Mrs Justice Roberts' order, procedural issues arose in relation to the joinder of the children as parties to the proceedings for the first time at the appeal stage. It was possible to deal with their participation at the directions hearing pragmatically in a way which was universally acceptable but I referred to the full court for consideration, if it deemed it appropriate, the question of what procedure should be followed in these circumstances.

7. At the full appeal, the parties were represented by the same counsel as at the directions hearing, save that the children were represented by Mr Hames leading Ms Gartland. Ms Kirby represented the mother pro bono, public funding not having been available to her although it is, of course, automatically available to an applicant for an order under the 1980 Convention. We are very grateful to her for redressing the unfairness that would otherwise have arisen. Thorpe LJ and Munby LJ (as they then were) expanded graphically in Re K [2010] EWCA Civ 1546 [2011] 1 FLR 1268 upon the disparity in the resources made available to the parties in proceedings such as this and the practical disadvantages at which this can place the respondent parent, see §§33 to 36 and 44 to 46 ibid.

The issues to be determined

8. The issues that fell for determination at the appeal were twofold: (1) the substantive challenge to Mrs Justice Roberts' return order and (2) the procedural question relating to the joinder of children as parties for the first time in the Court of Appeal.

9. The main substantive debate revolved around the judge's determination in relation to the child's objections exception in Article 13 of the 1980 Convention. It was also argued that the judge was wrong to reject the mother's argument based upon Article 13b) but this was very much a subsidiary part of the case presented by the appellants and, in the event, it has not been necessary to deal with it separately.

The law

10. In this case, as in others reaching this court in recent times, there was a significant debate as to the proper approach to the child's objections exception. I have therefore considered this in some detail and I propose to commence by examining the relevant law.

Some general observations

11. In cases under the1980 Hague Convention, speed is of the essence. The object of the Convention is to return abducted children as soon as possible to their home country, restoring the status quo and enabling the courts there to determine whatever disputes there are about their future upbringing. The longer the time that elapses following a wrongful removal or retention, the more difficult it becomes to return the child. In recognition of this, judgment is expected to be given no later than 6 weeks after the commencement of the proceedings (see Article 11(3) of Brussels IIa (Council Regulation (EC) No 2201/2003 of 27 November 2003, hereafter simply "Brussels IIa") and Article 11 of the 1980 Convention. The procedure adopted is summary.

12. It may be thought paradoxical that a summary procedure such as this should have generated the quantity of jurisprudence that the 1980 Convention has. Over the years there have been many technical and sophisticated legal arguments about how its terms should be interpreted and a significant number of appeals.

13. Technicality of this sort gets in the way of the objectives of the Convention. In Re P-J (Children) [2009] EWCA Civ 588 [2010] 1 WLR 1237, Wilson LJ (as he then was) observed, "Nowadays not all law can be simple law; but the best law remains simple law." In recent times, it has become increasingly apparent that the law relating to child's objections under Article 13 of the Convention, as it is presently perceived to be, is far from simple law. To judge by the number of applications to the Court of Appeal for permission to appeal on this point, it is not at all easy to put into practice. Does this have to be the case?

14. In order to attempt to answer that, I have reviewed the domestic jurisprudence in this field stretching back over more than two decades and cast an eye also over the way in which the law has been applied in other Hague countries. The parties

provided the court with two lever arch files full of authorities and I have looked at many more although I refer only to certain of them in this judgment.

Core provisions

15. It may be convenient to start my analysis by setting out the terms of Articles 12 and 13 in so far as they are relevant to child's objections.

> Article 12
> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> …."
>
> Article 13
>
> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
> (a) [consent and acquiescence]
> (b) [grave risk]
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained the age and degree of maturity at which it is appropriate to take account of its views.
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

16. Also relevant is Article 11 of Brussels IIa. This reinforces the 1980 Convention in the European context and, in relations between Member States, in so far as both the Convention and the Regulation cover the same matters, the Regulation takes precedence. I will not set out the whole of the article here, only Article 11(2) which is of particular importance.

> Article 11(2)
> "When applying Article 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

17. Another provision that makes a regular appearance in the jurisprudence is Article 12 of the United Nations Convention on the Rights of the Child 1989 (which came into force in the UK in January 1992) which provides:

> "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others; or
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals."

The traditional approach to the child's objections exception

18. In England and Wales, the normal approach to the child's objections exception is to break the matter down into stages. There is what is sometimes called the "gateway stage" and the discretion stage. The gateway stage has two parts in that it has to be established that (a) the child objects to being returned and (b) the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views. If the gateway elements are not established, the court is bound to return the child in accordance with Article 12. If the gateway elements are established, the court may return him or her but is not obliged so to do. This approach has not been challenged before us.

The older cases

19. In terms of the older cases on child's objections, In re S (A Minor)(Abduction: Custody Rights) [1993] 2 WLR 775 (Re S [1993]) seems to have been treated as the leading authority (see, for example, Ward LJ in Re T (Abduction: Child's Objections to Return) [2000] 2 FLR 192, hereafter "Re T", at page 202). Ward LJ derived 7 principles from the judgment of the court given by Balcombe LJ. I will return to these in due course.

Developments over the years

20. The older authorities need to be approached keeping in mind later developments of which I wish to pick out three.

21. The first of these in time was the implementation of Brussels IIa, and in particular Article 11 of that regulation, in 2005.

22. The second was the decision of the House of Lords, In re D (A Child)(Abduction: Rights of Custody) [2007] 1 AC 619 (Re D).

23. The third was In re M and another (Children)(Abduction: Rights of Custody) [2007] UKHL 55 (Re M) where the House of Lords set straight certain of the uncertainties and misconceptions that had grown up about the 1980 Convention.

24. I need to say a little more about Re D and Re M.

25. The main issue in Re D was whether the father had rights of custody so as to make the mother's removal of the child from Romania wrongful. The House of Lords decided that he did not and that was sufficient to conclude the Hague proceedings against him. However, Re D had wider importance and influence because of what was said about hearing the views of children involved in proceedings.

26. There had been a great deal of delay during the proceedings and, by the time the matter reached the House of Lords, the child was 8 years old and it was clear that he was adamantly opposed to returning to Romania. He was given leave to intervene in the House of Lords and a child's objections argument was advanced there for the first time.

27. Baroness Hale spoke of the "growing understanding of the importance of listening to the children involved in children's cases" (see §57) and referred to Article 11(2) of Brussels IIa which she considered required us to look afresh at the question of hearing children's views (§§58 and 61). In her view, the principle that emerged from that Article was applicable in every Hague Convention case and erected "a presumption that the child will be heard unless this appears inappropriate". She spoke of the need for children to be heard far more frequently in Hague Convention cases (§59) and examined the ways in which this might be done. She stressed, however, that hearing the child was not to be confused with giving effect to his views (§§57 and 58).

28. In Re M, the trial judge had found that the children were settled in England and that the child's objections exception was established. He approached the case from the standpoint that return could only be refused if the case was exceptional and, considering that it was not, ordered the return of the children to Zimbabwe. The House of Lords allowed the appeal and dismissed the father's application for the return of the children.

29. For our purposes, two particular related features of Re M are important. Both focus on the discretion stage of the court's decision.

30. First, Re M established that when it came to the exercise of the court's discretion after a ground for opposition to return had been made out, there was no additional test in the form of a requirement that the case be "exceptional". Baroness Hale said:

> "§40….I have no doubt at all that it is wrong to import any test of exceptionality into the exercise of discretion under the Hague Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention."

31. Secondly, Re M established that the discretion that arose was at large, ending the uncertainty that can be seen in earlier authorities as to whether it might be confined to a consideration of only two factors, namely the child's objections and Hague policy. Baroness Hale said:

> "§43….in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare….."

32. §46 of Re M is important and I will quote it in full:

> "In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. *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." (my emphasis for the purpose of discussion later in this judgment)

33. Re M did not address the gateway requirements of Article 13 in relation to a child's objections (and nor have subsequent authorities in the House of Lords and Supreme Court). However, in my view, some light was cast on the issue by what Baroness Hale said in Re M, as I will describe later.

What can be treated as established in relation to the gateway stage of the child's objections exception?

34. Where does the law stand in relation to the gateway requirements? Certain features can perhaps be treated as tolerably well established.

(1) Factual matters

35. It is established that whether a child objects to being returned is a matter of fact, as is his or her age, see for example Re S [1993] at 782 and Re T at 202. It seems to me that the degree of maturity that the child has is also a question of fact.

36. The authorities reveal a mild debate over whether, once the child's age and degree of maturity have been established and the court moves to the question of whether it is appropriate to take account of his views, it is making a finding of fact or exercising judgment. I am not sure that it would be of great assistance to get involved in this debate over how to categorise the process. What matters is how to go about it in practice and I will undoubtedly have to address that later.

(2) No chronological threshold

37. A second established feature is that there is no fixed age below which a child's objections will not be taken into account. However, the younger the child is, the less likely it is that he or she will have the maturity which makes it appropriate for the court to take his or her objections into account, Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716 at 729/730.

(3) Objections and not anything less

38. A further feature about which I think there is, in fact, no real difficulty is that the child's views have to amount to objections before they can give rise to an Article 13 exception. This is what the plain words of the Convention say. Anything less than an objection will therefore not do. This idea has sometimes been expressed by contrasting "objections" with "preferences".

39. The word "preference" made an appearance in the jurisprudence of the Court of Appeal as long ago as Re S [1993] at 782. Balcombe LJ quoted what Bracewell J said of Article 13 in In re R (A Minor: Abduction) [1992] 1 FLR 105, namely:

> "The wording of the article is so phrased that I am satisfied that before the court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."

Balcombe LJ commented that there was "no warrant for importing such a gloss on the words of Article 13, as did Bracewell J" and that the right course was to take the "literal words" of Article 13 "without giving them any such additional gloss".

40. It is not clear whether Balcombe LJ was intending to outlaw the idea that an objection was something "more than a mere preference", or whether his disapproval was confined to Bracewell J's statement that "objects" imports a strength of feeling going far beyond the wishes of a child in a custody dispute. There may not be much to be gained from speculating about this, as I think it is fair to say that matters have moved on since then.

41. To demonstrate this proposition, I move to the present and the Supreme Court decision in In the matter of LC [2014] UKSC 1 [2014] AC 1038 (Re LC). The focus in the Supreme Court was principally on whether, when determining the habitual residence of a child, the court may have regard to the child's own state of mind. However, there had been argument in the Court of Appeal (see Re LC (Children) [2013] EWCA Civ 1058 [2014 1 FLR 1458 at §§87 to 97) about whether Cobb J had been wrong to find that the wish not to return to Spain expressed by two of the children had the character of a preference rather than an objection. No attempt was made to persuade the Court of Appeal that reference to "preferences" was inappropriate in this context and, in the Supreme Court, Lord Wilson referred to the phraseology without apparent disapproval (see §8 and §17). I do not see it as a gloss on the Convention or as a term of art but rather as one way of summarising that, for reasons which will differ from case to case, the child's views fall short of an objection.

(4) Objection to return to country of habitual residence

42. It is said that the child has to object to returning to the country of habitual residence rather than to returning to particular circumstances in that country, although it has been clear from early on that there may be difficulty in separating out the two sorts of objection.

43. The ground for this acknowledgment of the potential difficulty was laid in what Balcombe LJ said Re S [1993] at 782D. However, it may be convenient to rely upon what he said a little later in Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716. Commencing at 729, he set out the principles which he considered were to be deduced from the authorities dealing with child's objections. He described the second of these as follows:

> "The second principle to be deduced from the words of the Convention itself, and particularly the preamble, as well as the English cases, is that the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent. Nevertheless, there may be cases….where the two factors are so inevitably and inextricably linked that they cannot be separated. Support for that proposition will be found in the judgment of Butler-Sloss LJ in Re M (A Minor)(Child Abduction) [1994] 1 FLR 390 at p 395…."

44. In Re M [1994], Butler Sloss LJ had said:

> "It is true that article 12 requires the return of the child wrongfully removed or retained to the State of habitual residence and not to the person requesting the return. In many cases the abducting parent returns with the child and retains the child until the court has made a decision as to the child's future. The problem arises when the mother decides not to return with the child. It would be artificial to dissociate the country from the carer in the latter case and to refuse to listen to the child on so technical a ground. I

> disagree with the contrary interpretation given by Johnson J in B v K (Child Abduction) [1993] Fam Law 17. Such an approach would be incompatible with the recognition by the Contracting States signing the Convention that there are cases where the welfare of the child requires the court to listen to him. It would also fail to take into account article 12 of the United Nations Convention on the Rights of the Child 1989. From the child's point of view the place and the person in those circumstances become the same….I am satisfied that the wording of article 13 does not inhibit a court from considering the objections of a child to returning to a parent."

45. Ward LJ's approach in Re T was similar. Listing the matters that had to be established in a child's objections case, he began with the following (at 203):

> "(1) Whether the child objects to being returned to the country of habitual residence, bearing in mind that there may be cases where this is so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated."

(5) Objections are not determinative

46. I referred earlier to the House of Lords decision in Re D. One of the things which it and Re M together made quite clear was that the fact that a child objects to being returned does not determine the application. I will set out in full §§57 and 58 of Baroness Hale's speech in Re D but the message is summed up in the final sentence of the latter paragraph:- hearing the child is not to be confused with giving effect to his views.

> "57. There is evidence, both from the CAFCASS officer who interviewed him after the Court of Appeal refused him leave to intervene, and from the solicitor who represents him, that A is adamantly opposed to returning to Romania. Yet until the case reached this House, no defence based on the child's objections was raised. This is not surprising. A was only four and a half when these proceedings were begun. At that age few courts would accept that he has "attained an age and degree of maturity at which it is appropriate to take account of its views". But he is now more than eight years old and he was more than seven and a half when these proceedings were heard by the trial judge. As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with

> what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.
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> 58. Brussels II Revised Regulation (EC) No 2201/2003 recognises this by reversing the burden in relation to hearing the child. Article 11.2 provides:
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> > "When applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."
>
> Although strictly this only applies to cases within the European Union (over half of the applications coming before the High Court), the principle is in my view of universal application and consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child. It applies, not only when a 'defence' under article 13 has been raised, but also in any case in which the court is being asked to apply Article 12 and direct the summary return of the child - in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child is, as already stated, not to be confused with giving effect to his views."

47. §§43 and 46 of Re M, quoted above, explain how, at the discretion stage, the court considers the child's objections alongside the other relevant factors. I will need to return to this but for the moment draw from it confirmation that the child's objections cannot be presumed to be determinative of the application; once the court's discretion arises, it is at large.

48. The position was underlined by Wilson LJ, as he then was, in Re W (Minors) [2010] EWCA Civ 520 [2010] 2 FLR 1165 (Re W [2010]) at §22, where he said that §57 of Re D eliminated earlier confusion about the meaning of the phrase "to take account" in Article 13 which, he said, "means no more than what it says". Reference was also made by Wilson LJ to a first instance decision of his own, Re J and K (Abduction: Objections of Child) [2004] EWHC 1985 [2005] 1 FLR 273, where, at §31, he rejected the argument there advanced that the phrase "take account" in Article 13 carried a somewhat different meaning from that which it would normally carry and concluded that it was akin to the requirement in section 1(3) Children Act 1989 to "have regard" to various matters.

49. Re W [2010] was a decision refusing permission to appeal and, although the respondent was represented and Reunite had prepared a skeleton argument, it was not necessary for the court to call upon them. It is appropriate to bear that in mind when considering what was said by the court, but it gave leave for the authority to be cited and I have found it of assistance in considering the questions that arise in this appeal. I will revert to it later.

Features requiring more discussion

50. I come now to the aspect of the child's objections exception that has troubled me considerably and which bears directly upon the substance of this appeal. The authorities appear to reveal an inconsistency of approach at the gateway stage. On the one hand, a highly technical, structured, approach is described which requires the court to go in considerable detail into the circumstances in which the children object (I will call this "the Re T approach"). On the other hand, there is support for a much simpler exercise at the gateway stage, with the detail of the case being considered if and when it comes to determining whether return should be ordered ("the more basic approach").

(1) The two approaches

51. Two Court of Appeal authorities feature prominently in the Re T approach. Re T itself is taken as the primary guide, with a more recent incarnation being found in the frequently cited §24 of Re K [2010] EWCA Civ 1546 (decided in November 2010).

52. In Re T,Ward LJ examined some of the early authorities and set out the principles that he considered could be drawn from them. The relevant passage (referred to hereafter as "the extract") begins at page 202 of the report. It is necessary to look at it in some detail in order to reach conclusions about the proper approach to the child's objections exception. However, as it is long, I will set it out in an appendix to this judgment rather than here.

53. What Ward LJ's approach requires is that, as part of establishing whether the child objects to being returned to the country of habitual residence and whether he or she has attained an age and degree of maturity at which it is appropriate to take account of his or her views (that is at the gateway stage), the court must ascertain *why* he or she objects and examine at least the four matters set out at the conclusion of the extract (beginning "(3) So a discrete finding as to age and maturity is necessary….", italicised in the Appendix).

54. The conclusion of §24 of Re K [2010] might be seen as a truncated version of the Re T approach, or at least to contemplate a similar exercise. It is as follows, with the relevant passage italicised:

> "24. Now it does not seem to me that the obligation to hear the child under the provisions of Article 11(2) of the Brussels II Revised regulation means that hearing the child, and hearing the wishes and the feelings of the child clearly stressed, almost automatically results in the conclusion that the child's objection threshold has been crossed and that all

> that remains is for the judge to exercise a discretion. The Convention is clear in its terminology. There must be a very clear distinction between the child's objections and the child's wishes and feelings. *The child who has suffered an abduction will very often have developed wishes and feelings to remain in the bubble of respite that the abducting parent will have created, however fragile the bubble may be, but the expression of those wishes and feelings cannot be said to amount to an objection unless there is a strength, a conviction and a rationality that satisfies the proper interpretation of the Article."*

55. Re M (Abduction: Child's Objections) [2007] EWCA Civ 260 [2007] 2 FLR 72 is an example of a Court of Appeal decision in which the Re T approach was followed, see particularly §§62 and 76, but it needs to be noted that it dates from before the decision of the House of Lords in Re M later in 2007.

56. In contrast, Re W [2010] (decided in May 2010) lends support for the more basic approach. Counsel for the father who was applying for permission to appeal had submitted that the evidence was too thin to support a finding that the children had attained an age and, in particular, a degree of maturity at which it was appropriate to take account of their views. Rejecting this, Wilson LJ said:

> "22. Earlier confusion in our jurisprudence about the meaning of the phrase "to take account" in Article 13 (exemplified, for example, in Re T (Abduction: Child's Objections to Return) [2000] 2 FLR 192 at 204 B-D) has in my view now been eliminated. The phrase means no more than what it says so, albeit bounded of course by considerations of age and degree of maturity, it represents a fairly low threshold requirement. In particular it does not follow that the court should "take account" of a child's objections only if they are so solidly based that they are likely to be determinative of the discretionary exercise which is to follow: see In re D above per Baroness Hale, at [57], and Re J and K (Abduction: Objections of Child) [2004] EWHC 1985, [2005] 1 FLR 273, at [31]."

57. I would pick out three things in particular from this passage. First, Wilson LJ considered that the passage that he identified in Re T revealed confusion as to the meaning of "to take account". The Re T passage in question is the italicised passage to which I referred at §53 above. Secondly, Wilson LJ was of the view that the threshold requirement was "fairly low". Thirdly, he rejected the notion that the court should only take account of the child's objections if they were so solidly based that they were likely to be determinative of the following discretionary exercise. Taking these things together, I conclude that Wilson LJ was, at the very least, distancing himself from the Re T approach.

58. It is interesting to note that in WF v FJ, BF and RF (Abduction: Child's Objections) [2010] EWHC 2909 (Fam) [2011] 1 FLR 1153 a few months later in August 2010, Baker J was presented with the argument that there was an

inconsistency of approach in the Court of Appeal as between Re T and Re W (see §§28 to 30 of WF v FJ). He dealt with it briskly as follows:

> "30. With respect to [counsel], it seems to me that this is not really a problem at all. The combined effect of the House of Lords decision in Re M (Abduction: Zimbabwe) and the Court of Appeal decision in Re W is that it is now recognised that the gateway or threshold for taking account of a child's objections is "fairly low" and the factors identified by Ward LJ in Re T are, as Baroness Hale indicates, properly dealt with at the discretion stage."

59. When I referred to Re K earlier, I mentioned that it was decided in November 2010. I did so in order that the sequence of decisions could be observed. If Re K perpetuated the Re T approach in its requirement that an objection must have "a strength, a conviction and a rationality that satisfies the proper interpretation of the Article", it has to be recognised that it did so *after* the decisions of the House of Lords in Re D and Re M and of the Court of Appeal in Re W. But none of these authorities were mentioned in the judgments in Re K which appear probably to have been given ex tempore .

(2) My views on the proper approach

60. Where does that leave us?

61. My view is similar to that expressed by Wilson LJ in §22 of Re W. It seems to me that some of the older jurisprudence is infected by confusion, or at least uncertainty, as to how Article 13 generally was meant to operate and how the child's objections exception itself was to be applied.

62. Particularly influential was the notion that the child's objections would be determinative (or virtually determinative) of the outcome. Ward LJ appears to have been inclined to this view when he gave his judgment in Re T. He dealt with the question of discretion at 212G. In the light of the facts of the case, he found it unnecessary to reach a definitive conclusion on how the Article was intended to work but he said that he was inclined to agree with the view expressed in Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716 at 734 that if the child is of sufficient age and maturity for his views to be taken into account, the Convention envisages that he will not be returned against his wishes unless there are countervailing factors which require his wishes to be overridden. It is perhaps not surprising that, in this context, the court would scrutinise the child's objections and maturity in some detail at the gateway stage as there may be little, if any, room for such scrutiny later in the process.

63. I do not consider that that sort of reasoning can survive the decisions of the House of Lords in Re D and Re M. We know now that the child's views are *not* determinative of the application or even presumptively so; they are but one of the factors to be considered at the discretion stage. We also know that the discretion is at large; there is no requirement of exceptionality, and the court is entitled to take into account the various aspects of Convention policy, the circumstances which gave the court discretion in the first place, and wider considerations of the child's

rights and welfare. Baroness Hale did refer in Re M at §46 (quoted earlier in this judgment) to 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". However, what is important is that she spoke of these factors being relevant "[o]nce the discretion comes into play", making no mention of them playing a part at an earlier stage. Given her focus upon the importance of hearing children's views, this is entirely understandable.

64. Furthermore, I am persuaded that the Re T approach is unhelpful.

65. For a start, it leads to a puzzling duplication. I have no doubt that the sort of considerations identified by Ward LJ in Re T at 204 B to D can be relevant to the exercise of discretion, albeit that they would need to be expressed slightly differently in that context. If they have to be considered at the gateway stage as well, they may fall to be considered twice.

66. Perhaps more worryingly, the Re T approach might, in some cases, rob the discretionary stage of its proper role. It is only at the discretionary stage that the sort of matters that the Re T approach requires to be considered at the gateway stage can be weighed up together with the other factors that are potentially relevant. Yet, if these matters have to be addressed at the gateway stage, two extremes are possible. The process may end there, the conclusion being reached that, measured against the rather sophisticated yardstick being used, the child does not have the maturity to make it appropriate to consider his or her views. Alternatively, if the objections, age, and maturity measure up to the required standard, the discretionary stage may add little because the court has already had to form a view about welfare issues at the earlier stage. There may be little extra to put into the balance when exercising the discretion save what may be termed Hague Convention considerations, notwithstanding the clear message of Re M that the discretion extends beyond this. It may not be just a product of the facts of the particular case that in Re T itself, the court found only two factors to place in the balance against the child's views, both essentially Hague Convention considerations.

67. Furthermore, it is now recognised that children as young as 6 can be of sufficient maturity to have their objections taken into account, see Re W. Would a faithful application of Re T approach really permit of this result? The perspective of a 6 year old as to what is in his or her interests, short, medium and long term, will necessarily be very limited and the Re T approach would surely be a formidable obstacle to his or her objections being taken into account. The fact that a 6 year old may not be as able as an older child to understand and take account of all the material considerations is catered for at the discretion stage by the fact that (see §46 of Re M) "[t]he older the child, the greater the weight that her objections are likely to carry".

68. It is also difficult to make the Re T approach work alongside Article 11(2) Brussels IIa which makes provision for the child to be heard during the proceedings. Article 11(2) also requires an assessment of the child's maturity. Should the Re T approach be used to carry out that assessment? I am doubtful that

it should be transposed into that setting, or that it realistically could be. And yet, the idea that a different approach to assessing maturity should be used for Article 11(2) Brussels IIa from that used for Article 13 of the 1980 Convention is unpalatable and would, inevitably, introduce further undesirable complexity.

69. In the light of all of this, the position should now be, in my view, that the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. Sub-tests and technicality of all sorts should be avoided. In particular, the Re T approach to the gateway stage should be abandoned.

70. I see this as being in line with what Baroness Hale said in Re M at §46. She treated as relevant the sort of factors that featured in Re T but, as she described the process, they came into the equation at the discretion stage. It also fits in with Wilson LJ's view in Re W that the gateway stage represents a fairly low threshold.

71. I do not see it as altering the outcome of most cases although it may sometimes make the route to the determination rather less convoluted. In particular, it would not lead to considerations which are undoubtedly relevant being lost, as they will be given full consideration as part of the discretionary stage. It would be unwise of me to attempt to expand or improve upon the list in §46 of Re M of the sort of factors that are relevant at that stage, although I would emphasise that I would not view that list as exhaustive because it is difficult to predict what will weigh in the balance in a particular case. The factors do not revolve only around the child's objections, as is apparent. The court has to have regard to other welfare considerations, in so far as it is possible to take a view about them on the limited evidence that will be available as part of the summary proceedings. And importantly, it must give weight to the Hague Convention considerations. It must at all times be borne in mind that the Hague Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned and returned promptly. To reiterate what Baroness Hale said at §42 of Re M, "[t]he message must go out to potential abductors that there are no safe havens among contracting states".

72. Before I move on to how things should work in practice from now on, if my colleagues agree with my view of the law, I need to mention §22 of the decision of this court in Re KP (Abduction: Child's Objections) [2014] EWCA Civ 554 [2014] 2 FLR 660. Re KP was a child's objections case but the focus of it was a meeting that had taken place between the child and the judge, which had crossed the line between, on the one hand, hearing the child and, on the other, gathering evidence. Lord Justice Moore-Bick gave the judgment of the court with which all members of the court were in agreement. I was a member of that court.

73. There is a section of the judgment entitled "The approach of the courts to 'hearing' children in Hague cases". It commenced with the following paragraph:

> "§22 In addition to the formal guidelines, the question of judges meeting children, particularly within the context of

> child abduction proceedings, has been considered by the courts on a number of previous occasions. Before turning to those cases however, it is helpful to describe the process that a court evaluating a child's objection under Article 13 has to undertake. The process was described in clear terms by Ward LJ in Re T (Abduction: Child's Objections to Return) [2000] 2 FLR 192. Ward LJ described a three stage process. Stage 1 involves finding whether the child objects to being returned to the country of habitual residence. Stage 2 is to determine whether the child has sufficient age and maturity to come within Article 13. In the present case Parker J readily found those two stages established in K's favour. It is therefore the third stage, as described by Ward LJ, which is of the greatest importance in evaluating this appeal:
>
> > "(3) So a discrete finding as to age and maturity is necessary in order to judge the next question, which is whether it is appropriate to take account of the child's views. That requires an ascertainment of the strength and validity of those views which will call for an examination of the following matters, among others:
> >
> > (a) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is *her* views which have to be judged appropriate. [original emphasis]
> >
> > (b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?
> >
> > (c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly, or indirectly exerted by the abducting parent?
> >
> > (d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?""

74. In so far as this appears to be an endorsement of the Re T approach requiring consideration of the listed factors at the gateway stage, it was not a deliberate endorsement. This particular aspect of the child's objections exception was not in issue in the case and there was no citation of the authorities necessary for us to have determined the point. Furthermore, although I no longer have access to Mrs Justice Parker's judgment in order to confirm this, it appears from §13 of the Court of Appeal judgment that the judge had, in fact, accepted that K was objecting and was of an age and degree of maturity at which it was appropriate to take account of her views. It was her subsequent analysis of K's objections, which involved her taking into consideration material obtained during her interview with the child, upon which our attention was focussed.

75. In all the circumstances, I do not consider that §22 of Re KP constrains me in my present analysis of the law, which benefits from having received submissions from counsel which were targeted on the very point and has resulted from protracted study of the relevant authorities.

76. I now turn to how the law will work in practice. I do not intend to say a great deal on this score. The judges who try these cases do so regularly and build up huge experience in dealing with them, as do the CAFCASS officers who interview the children involved. I do not think that they need (or will be assisted by) an analysis of how to go about this part of their task. In making his or her findings and evaluation, the judge will be able to draw upon the entirety of the material that has been assembled in relation to the child's objections exception and to pick from it those features which are relevant to his or her determination. The starting point is the wording of Article 13 which requires, as the authorities which I would choose to follow confirm, a determination of whether the child objects, whether he or she has attained an age and degree of maturity at which it is appropriate to take account of his or her views, and what order should be made in all the circumstances. What is relevant to each of these decisions will vary from case to case.

77. I am hesitant about saying more lest what I say should be turned into a new test or taken as some sort of compulsory checklist. I hope that it is abundantly clear that I do not intend this and that I discourage an over-prescriptive or over-intellectualised approach to what, if it is to work with proper despatch, has got to be a straightforward and robust process. I risk the following few examples of how things may play out at the gateway stage, trusting that they will be taken as just that, examples offered to illustrate possible practical applications of the principles. So, one can envisage a situation, for example, where it is apparent that the child is merely parroting the views of a parent and does not personally object at all; in such a case, a relevant objection will not be established. Sometimes, for instance because of age or stage of development, the child will have nowhere near the sort of understanding that would be looked for before reaching a conclusion that the child has a degree of maturity at which it is appropriate to take account of his or her views. Sometimes, the objection may not be an objection to the right thing. Sometimes, it may not be an objection at all, but rather a wish or a preference.

The application of the law in this case

The facts as derived from Roberts J's judgment

78. The father is Irish. The mother is British. They were married in 1996 and lived throughout their married life in Southern Ireland where the four children were born and raised. The mother was the children's primary carer although there were occasions, such as in November 2013 and February 2014, when the father took care of them in the mother's absence in England. The father provided financially for the family.

79. By November 2013, both parents had acknowledged that the marriage was over and plans had been made for a separation. However, the whole family continued to live in the family home until 12 March 2014 when the mother brought the

children to England without any notice to the father. She conceded that this was a wrongful removal for the purposes of Article 3 of the 1980 Convention.

80. The mother asserted that there had been a significant history of domestic abuse which was largely denied by the father. Orders were made by Mr Justice Hayden with the object of securing information and records from various authorities in Ireland which might enlighten the court as to what had occurred there. Mrs Justice Roberts recounted in her judgment that she had been told that, for reasons which were unclear to her, the orders had never been properly sealed and the intended recipients had received unsealed copies only. None of the information sought had been forthcoming. She had to do the best she could without it. In approaching the mother's case in relation to Article 13b), she said (§28 of the judgment) that she had reminded herself that it was not her function to determine disputed facts and that she was to take the allegations at face value. She did later appear to make some findings of fact in relation to the experiences of the children in the home, however.

81. The evidence before the judge consisted of a statement from the mother and a statement from the father, a CAFCASS report from Ms Bennett-Hernandez who had interviewed the children on 22 May 2014 for the purpose of ascertaining their views about a return and made some enquiries of the children's schools and of the Child and Family Agency in Ireland, and oral evidence from Ms Bennett-Hernandez. The judge also had two brief letters from the schools that the children had been attending in this jurisdiction.

82. The mother originally indicated an intention to apply for authority to seek a psychological report on J but that was not pursued. It seems that the lack of public funding for the mother (apparently because she owned a beneficial interest in the matrimonial home in Ireland) had placed her in difficulty in this regard. Ms Kirby did not apply, on the mother's behalf, for an adjournment of the hearing before Mrs Justice Roberts so that such a report could be obtained. The judge recorded that this was because the mother did not want any further delay for the children. However, in closing submissions, counsel did invite the judge to consider the option of deferring her decision pending input from an expert.

The evidence of the CAFCASS officer

83. The judge dealt at some length in her judgment with what the CAFCASS officer told her about the children. She accepted that the officer is extremely experienced (§32). She said expressly that she accepted what Ms Bennett-Hernandez told her when she was expanding upon her report in oral evidence (§46) and, by implication, she accepted what was said in the written report as well.

84. The CAFCASS evidence, and the judge's treatment of it, is, of course, central to a consideration of the grounds of appeal. Given where that consideration leads me, it will be necessary to have regard to the CAFCASS evidence also in determining the ultimate outcome of the appeal. Accordingly, I need to set the material out rather more fully than would otherwise be the case. We have been provided not only with the CAFCASS report but also with a transcript of the officer's oral evidence. However, for the most part, I will adopt the judge's account of the material as that is the most convenient summary of it to use for present purposes.

Where I give paragraph numbers, they refer to paragraphs in the judge's judgment rather than the CAFCASS officer's report unless otherwise stated.

85. In relation to J, the judge recounted that:

i) The interview with him was difficult. He was muddled and distressed and at one point broke down and cried uncontrollably. He was trembling and visibly distressed and inconsolable for the rest of the interview.

ii) "…[H]e was able to describe in clear terms his father's verbal aggression, the occasions when either he or his brothers had been hit by the father and his witnessing physical assaults by the father on the mother. He said he saw his father drunk and out of control and that this was a frightening situation for all the children to witness. He said that his father would pick on him, calling him names and restricted the amount of time he was able to spend outside the home with friends. He recalls specifically an occasion when he hurt his arm while cutting logs and his father refused to seek medical attention prior to the mother's return, at which point she took him to hospital." (§37)

iii) "He certainly recounted specific incidents of abuse perpetrated by the father against the mother when there was police involvement. He spoke of his father spending time in prison and his mother being taken to hospital when it was necessary for an aunt to take over the care of the family." (§39)

iv) "He viewed his school in Ireland as providing him with some respite from the situation at home, but spoke of occasions when he had been upset at school. He spoke of a feeling of confidence at his school in England, where he felt out of his father's reach. The report speaks of a letter from his pastoral care staff member …. which confirms that he continues to be troubled by his fears of the father. He has, as a result, been referred by the school for counselling. He confirmed to Ms Bennett-Hernandez in some distress, that he did not want to return to Ireland, because he was afraid of his father." (§40)

v) Ms Bennett-Hernandez said in oral evidence of him that his presentation did not suggest that he was caught in the middle of his two parents but rather was expressing views of his own about events that he had seen. She observed that: "His terror of the father is more than the dispute about where he should live." (§46)

vi) Ms Bennett-Hernandez had been left with the very clear impression from what J told her that his understanding was that if they returned, the father would put them in care (§49). J told her that this was something he had threatened to do before their departure for England (§48). She thought it probably was part of the rationale for the resistance to a return to Ireland, in particular on J's part, that there was an understanding that in some way they would be removed from their mother's care or return to the household where their father was present.

86. In relation to T the judge recounted that:

i) T was "not as emotionally fragile" as J during the interview with the CAFCASS officer. He was described as "reserved and thoughtful" in the way he responded to questions. Initially he expressed no concerns at all about being returned to Ireland.

ii) "Once the issue of the father's application to the court was raised, however, he expressed himself to be scared. When he was pressed as to why he explained that his father's treatment of the mother and her distress as a result all seemed to be afraid of the father [sic[1]]. He too is clearly aware of the imbalance in the parental dynamic in the home. He was clearly concerned both for the mother and for J, who he described as the one amongst the siblings who cried a lot." (§41)

iii) "T said he was happy and settling in his new school in England. When he was asked about the prospects of a return to Ireland he shrugged his shoulders and was unable to make any comment, although he was reported as looking sad. He did tell Ms Bennett-Hernandez that he had mixed feelings about leaving Ireland. He said he missed his friends, but he was happy, because the family was removed from the father's influence." (§42)

iv) In cross examination, Ms Bennett-Hernandez said that T's overriding feeling on leaving Ireland was one of safety that he and his family had left the father behind in Ireland. She said that T's shrugging of his shoulders indicated resignation rather than ambivalence (§51).

87. In relation to I, the judge recounted that:

i) I was reported to be the most voluble of the children during her interview with the CAFCASS officer. Her immediate response was that she did not want to return to Ireland because the father was abusing her.

ii) "She too reported confidently and without anxiety that the father had hit the mother and sworn at her and her brothers. She was able to recall an occasion when the father had hit her on the back of her hands. She spoke of occasions when she had been distressed at home and that one of her teachers had assisted the family's departure by buying their travel tickets, an aspect of the case which is unsupported by any other evidence and in respect of which no mention is made in the mother's evidence." (§43)

iii) "She too professed herself to be scared of her father and was happy to be getting away from him." (§44)

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[1] This passage in the judgment appears to be based upon what the CAFCASS officer said in her report at §29 at E9 of the bundle. That makes it clear that what T was saying was that his father constantly shouted and swore at his mother which made her cry and this caused him and his siblings to be upset and afraid of their father. He told the officer also that his father made threats to "kill our dog" to which his mother told him "no" but T considered that his father did not listen to his mother because he often said it was his house and no one could tell him what to do in his house.

88. On behalf of the father, counsel explored with Ms Bennett-Hernandez the possibility that the children's views had been influenced by input from the mother or that they were fabricating their accounts. This was not the impression she had gained. As the judge summarised it at §47, "She felt very much that in particular J had experienced what had occurred. His account was muddled by the intensity of what he had experienced, but she had no doubt that it felt very real to him." Her evidence was that overall she had been left with a lot of concerns. She did not think the children were lying about the intensity of their feelings or their experiences or that they were trying to mislead her (§53). The judge recounted (§54) that, "In terms of the possibility of negative influence from the mother it was her view that such was the strength of feeling expressed by the children that it would take a lot more than two months of separation in England for any negative influence to be apparent."

89. On behalf of the father, Ms Chaudhry had carefully put to the CAFCASS officer inconsistencies between the children's accounts on the one hand and, on the other, the accounts given by the parents and circumstances which were otherwise known. The judge had this well in mind as can be seen from §§45 and 46. The CAFCASS officer's evidence was that the inconsistencies did not necessarily mean that the events did not happen and she gave a number of possible reasons for the discrepancies. Dealing with J in particular, she said that when he told her of the events he was crying and sobbing and there were lots of things that he wanted to say so she would not be entirely surprised if he did not clearly articulate how he was feeling and what was happening (see §46 of the judgment and E25D of the transcript of the CAFCASS officer's evidence which may well be the passage that the judge was seeking to quote). Dealing with both the suggestion that the children's accounts were the product of the influence of the mother and the implications of the inconsistencies, the officer said, in a passage to which the judge alluded at §55:

> "In actual fact …. I would almost feel that if the mother were to maximise her position as being the person that is able to influence I would have thought that the children would have been able to be much more accurate. So, their inaccuracy might suggest that actually they were given [sic, but I think the correct word must in fact be "giving"] an account which is real for them, not necessarily linked to mother or father and in actual fact may be indicative of children when traumatised, their account and ability to recount things and narrative does become muddled and blurred" (E34).

90. Ms Chaudhry had explored with the CAFCASS officer the tie between the children's objection to returning to Ireland and their objection to returning to the father's care which they were unable to distinguish from each other. She put to the officer the protective measures that could be put in place to keep the children separate from the father and safe. The judge recorded at §56 what Ms Bennett-Hernandez said in response. As I have the benefit of the transcript of that evidence, which was not available to the judge, it may be helpful to quote from that directly and a little more extensively than did the judge, see E35. Ms Bennett-

Hernandez said that she had in fact explained to the children that returning to Ireland and returning to the father were separate but what she thought was difficult for them was that the return would be within the same area/location. The fuller version of the passage quoted by the judge is as follows:

> "I don't think the children – I don't think the concern, certainly I got from the children, was that they were concerned about being removed. I mean, obviously going into care was a concern, but this is not something that was actually said, but I think what came across to me was all these things that they felt the father had done and what they had witnessed they have not felt that the adults, whether it be in school or whether it be from the father's family, extended family, have been able to help and albeit that there is much debate about when the police were called or not, but in their mind it does not feel as though the police have been able to act in a way which they feel maybe gave them any reassurances…. So, I'm not saying it may not have been able to reassure them [sic], but I think the sense I got from the children was he will still be in the area and up to that point what they had seen and experienced it didn't appear to them as though the adults had really been able to protect them. Not even their own mother has been able to protect them."

91. When Ms Chaudhry asked the CAFCASS officer about whether the children understood that they may not even have to go back to the same area, she said that she had talked to T about what the situation would be if they moved. Her answer then strayed into wider welfare issues and that line of questioning came to an end.

92. A further issue that had been raised by Ms Chaudhry with the officer was the contact that the children had had with the father since coming to England and the father's account of the children expressing feelings of affection and love for him. The judge set out at §57 that Ms Bennett-Hernandez had accepted that this was interesting if true but not necessarily significant and that her evidence was that if the children had witnessed violence and lived in a home where they were afraid of their father, they were unlikely to have the capacity to assert anything other than respect and/or what was expected.

93. In addition to her report and her oral evidence, the CAFCASS officer produced a letter written by J to the judge (referred to by Mrs Justice Roberts at §60) in which he said:

> "Please do not send me back I am scared that my dad will abuse me and if I go back I will commit suitcide." (sic)

94. Mrs Justice Roberts reached a number of conclusions about the children's experiences and their feelings:

i) She said that it was plain from the detail of what J was able to recount from hearing his parents argue that he had been exposed in a completely

inappropriate way to the adult issues which had arisen in the marriage and in the context of its disintegration (§39). She said (§60) it appeared that he was the child who had suffered most as a result of the treatment he says he experienced at the father's hands and he did not appear to have been able to contemplate a situation in which he was living independently from the father with stringent safeguards in place to protect his mother.

ii) She said that it was quite clear to her that all three children had been "inappropriately exposed to abuse which they describe as having been perpetrated by the father against the mother and in terms which each is able to recount quite clearly and in specific terms" (§45).

iii) At §58 she said:

> "It is clear to me that each of these three children is expressing a feeling of being safe in the context of being removed from the sphere of the father's influence and geographical proximity. Each is clearly in my view, expressing feelings of a security, which they did not enjoy in the home which was occupied jointly by their parents. Whilst J's feelings of safety and security appear to flow principally from his own security away from his father, T and I's relief from the situation at home appears to be focused more on their mother's safety and physical security."

iv) She accepted (§62) that "each of the children had found their experiences within the family home to have been frightening and, to the extent that they have been exposed to domestic abuse perpetrated by the father against the mother they have, in my view, suffered both emotional and psychological harm."

The judge's determination

(1) Article 13b

95. The judge's main concentration was on the mother's argument that Article 13b applied. She had "absolutely no doubt" that if the return was to be to a household including the father, the mother's argument would prevail. She was persuaded however that that would not be the case and that the safeguards that could be put in place through the Irish courts and by virtue of the undertakings offered by the father would be sufficient. She did not dismiss from her consideration the "very obvious distress which J is currently displaying" and that he was to have an initial assessment by CAMHS imminently, but she relied on the evidence that appropriate services and treatment would be available in Ireland, albeit that the timing of J's access to those services remained unclear (§71). The core of her conclusion can be found in §72:

> "Thus, with some reluctance and with a very full and clear appreciation of the mother's concerns and the extent of her distress and apprehension at the prospect of a return, I have

> reached the firm conclusion that she has failed to establish the first limb of her defence that the potential effect of the alleged abuse would pose a grave risk of harm to these children in the event of a return. The threshold to make out an Article 13b defence is an exceptionally high one and I have taken the view that the clear and compelling evidence which would be required to establish such a defence is simply not made out here."

(2) Children's objections

96. What the judge said about the child's objections exception when she initially delivered her judgment orally is not clear. We were told by counsel for the mother that when the judgment had been given, it was submitted to the judge that she had not dealt sufficiently with this aspect of the case and she therefore worked on the judgment further, a corrected version being made available in the form of the approved transcript two or three weeks later. It is this corrected version that has been made available to us.

97. I would say in passing that this may not be the best way in which to deal with a revision of substance made to a judgment in response to counsel's submissions following its delivery. I do not know whether significant changes were in fact made by the judge here – perhaps they were not. I would simply observe that it may sometimes be important for the appeal court to know what the judge's original reasoning was and to be able to identify how this changed or developed subsequently. It is likely to be better practice in many cases, therefore, to provide an addendum to the original judgment than to amend the judgment itself.

98. The judge's treatment of the question of the children's objections begins ostensibly at §75 although the cases cited at §74 are material to this aspect of the case. She was not satisfied that the views expressed by the children to the CAFCASS officer were objections in Convention terms (§78). Her reasoning for this was:

> "77. …..Whilst each of the children has said he/she does not wish to return to Ireland, I am entirely satisfied that their wishes in this context flow from a genuine concern or fear that such a return will expose them either to a return to their father's care or a removal at his instigation from their mother's care or to a risk of further abuse, physical or psychological, perpetrated by him and directed towards either them or their mother.
>
> 78. Given the context of the practical arrangements which I have already addressed in the context of the father's proposed return of these children to their country of habitual residence (sic), I am not satisfied that the views that they have expressed to the CAFCASS officer can properly be said to amount to a clear objection in Convention terms. Whilst they may wish to remain in the protective bubble of respite which they are currently

> experiencing in their mother's care with all that the physical and geographical separation from their father brings, I do not accept that their stated views amount to an objection for current purposes."

99. She went on to say that even if she was wrong about this and the child's objections exception applied, she would not exercise her discretion not to return the children to Ireland. Her reasoning for this was:

> "79. …I am not satisfied that J's current highly emotionally charged state enables him to make a clear and balanced assessment of his situation both here and as it might be were he to return home with all the necessary safeguards in place for his, his siblings and his mother's protection from further abuse at the father's hands.
>
> 80. As far as T is concerned, he was initially ambivalent about a return. In the light of his and I's ages and their collective understanding, as I find it to be, I can place little weight on what they have said as justifying an exercise of my discretion to refuse to order a return."

Consideration of the appeal against the judge's decision in relation to the children's objections

100. I have set out in full the judge's reasoning for her rejection of the mother's case in relation to the child's objections exception. I am afraid that I find it insufficient to enable me to understand clearly what her thinking was. What does emerge, I think, is that the mother's case fell at the first hurdle on the basis that, in the judge's view, the children were not objecting at all in Convention terms. No consideration was therefore necessary, and none was given, to whether they were of an age and maturity at which it was appropriate to take account of their views. What also seems tolerably clear from the details upon which the judge relied and the terminology she used in §§77 and 78 (including her reference to a "bubble of respite") is that she was influenced by the line of authorities including Re T [2000] and Re K [2010].

101. Doing the best I can, it seems to me that what weighed with the judge in her determination was that the children had failed to appreciate what protective measures could be put in place upon their return, which in her view would be sufficient to safeguard them and their mother from their father. She seems to have taken the view that this mistake vitiated their views.

102. In my view, the judge was wrong to conclude that the children were not objecting in the Article 13 sense. The CAFCASS officer's evidence made it clear that they were. As I have set out much of that evidence already above, I will not go through it all again, merely mention some central features.

103. As can be seen from §27 of her report, when the officer raised with J what his response would be if the court decided that he had to return to Ireland, J, who had been distressed through much of the interview, cried more. When he found breath

to speak, he said that he does not want to return to Ireland because he is afraid of his father. He, like the other children, said he felt safe in England away from the father. In addition to telling the CAFCASS officer during his interview with her, he conveyed his message as plainly as he could in his own letter to the judge which I have quoted earlier.

104. After initially indicating that he had no worries about returning to Ireland, T said he was scared for reasons which he explained to the CAFCASS officer. He too was clear in stating his wish to remain in England. When he was asked what his response would be if the court said he had to return, his response was to shrug his shoulders and look sad in what the CAFCASS officer thought was resignation.

105. The youngest child, I, also told the CAFCASS officer that she was scared of her father and that she wants to remain here.

106. It is, of course, for the judge to determine whether the children's views amount to objections but I note that the CAFCASS officer spoke in her report in terms of the children objecting. She said that:

i) "J objects to a return to Ireland because he believes he is at risk of harm from the father" (§44)

ii) "[T] objects to a return to Ireland as he believes he, his siblings and his mother will be at risk of harm" (§45)

iii) "I's objection is that her father is 'abusing her, her brothers and mother' and because of the father's conduct and behaviour she is afraid of him" (§46)

107. In this case, there was a careful exploration in cross-examination of whether the children's objections were the product of influence or manipulation by the mother. This was an entirely appropriate investigation but it is clear that the judge did not take the view that the children had been manipulated into saying what they did. She said expressly at §77 (see above) that she was entirely satisfied that their wishes flowed from a genuine concern or fear that a return would expose them either to a return to their father's care or a removal at his instigation from their mother or to a risk of further abuse, physical or psychological, perpetrated by him and directed towards them or their mother. In so far as this amounted to a *finding* by the judge that the father was responsible for abuse and other undesirable conduct in the home, I will need to return to it. But I see no reason to interfere with the judge's assessment that the children were voicing their own wishes and feelings and that they were born of genuine concern or fear. There was ample foundation for this in the evidence, in particular the evidence of the CAFCASS officer who had the twin advantages of having a great deal of professional expertise and of having met the children. It was also supported by the very obvious distress that J was currently displaying and the fact that each of the children was expressing a feeling of being safe away from the father, in terms of his geographical proximity and his sphere of influence.

108. I do not detect that the judge's refusal to categorise the children's views as objections had anything to do with the strength of the feelings expressed. This is

unsurprising as, in my view, the evidence established that they went well beyond a mere preference to remain in this country.

109. As to whether the children objected to a return to Ireland, this was one of those cases in which they were unable to separate their feelings about that from their feelings about their father. They saw their father as having a power and reach in Ireland that would mean that they could not be protected from him if they returned there. Whether that was right or not might be very relevant at the discretion stage, but on the facts of this case, it was irrelevant to the gateway stage as their feelings were firmly entrenched, real, and not so obviously misguided as to call into question their maturity.

110. What of the children's age and degree of maturity? The CAFCASS officer thought J was emotionally unstable and of a nervous disposition and that he would benefit from therapeutic help, but she still assessed J and T as having a degree of maturity in line with their actual ages. This does not seem to have been challenged. I have no hesitation in concluding that they had attained an age and degree of maturity at which it is appropriate to take account of their views and indeed it does not seem that the contrary was urged upon the judge. I was said to be a typical 5 year old in the sense of being unguarded and open in her views. She was even younger than the 6 year old child in Re W. I am hesitant in accepting that her age and maturity are such as to make it appropriate to take account of her objections. However, for two reasons, I do not propose to spend time on this issue. I note, firstly, that in her skeleton argument for the hearing before Mrs Justice Roberts, Ms Chaudhry approached it with a rather light touch, recognising a trend towards the courts taking into account the wishes of younger children and choosing to stress the very clear distinction between taking into account a child's views and those views being determinative of the proceedings. Secondly, I am in no doubt at all that returning I to Ireland without her siblings would expose her to an intolerable situation. Accordingly, on the facts of this case, I need not reach a firm view about this question because, for reasons which I am in the course of explaining, I would not order the return of J and T.

111. To sum up so far, in my view the judge's determination that the children did not object to being returned had no proper foundation and should be set aside. I would substitute a finding that all three objected. I would go on to find that J and T are of an age and degree of maturity at which it is appropriate to take account of their views. That takes me to the discretionary stage of the process.

Discretion

112. The judge appears to have approached the exercise of discretion focussing solely on the children not having an accurate understanding of what a return to Ireland meant, and in particular failing to appreciate that safeguards could be put in place.

113. This was, in my view, much too narrow a consideration of the issue as I hope will become clear from the remainder of this section of my judgment. It follows that the judge's exercise of her discretion cannot be sustained. We must therefore determine whether we should remit this case for a High Court judge to consider how it should be exercised in the light of such further evidence as may then be filed and following a review of all of the relevant factors, or whether we can

decide the issue ourselves. Ultimately, I have determined that it would be inappropriate to remit the case and that, given the material available to us, and bearing in mind that this is a summary procedure and that decisions have necessarily to be taken on imperfect material, we are in a position ourselves to determine how the discretion should be exercised. In these circumstances, rather than setting out a critique of the judgment with a view to demonstrating that it omitted to consider the relevant factors, I will go through those factors myself in such a way as also to enable me to explain my own view as to return.

114. Before I embark upon this, I need to deal with a preliminary matter that arises.

115. The father argued that the judge had been wrong to make findings or draw conclusions about the children's experiences at home upon the basis of what they told the CAFCASS officer. In particular, as I have set out above, the judge said that it was quite clear to her all three children had been inappropriately exposed to abuse. It was argued that the judge should not have made such findings without the father having a proper opportunity to address the allegations which, it is said, he did not have as he had filed his witness statement before the CAFCASS report was available and the officer gave evidence. It was further argued that where he did address the allegations, his evidence was not given the weight it deserved.

116. The father sought leave to adduce fresh evidence addressing the CAFCASS material and the statement filed by J and D's solicitor for the appeal. To that end he wished to file a statement from himself answering certain of the allegations made about his conduct and exhibiting various letters from people in Ireland who know the family, school reports and other material for the purpose of demonstrating that matters were not as described by the mother and the children.

117. Some of the material (the "references" from people in Ireland and the school reports) could have been produced to Mrs Justice Roberts but, perhaps over-indulgently, I have had regard to all of it. I have also had regard to what J and D's solicitor relayed in her statement, which revealed no improvement in J's state of mind or in the strength of his opposition to returning to Ireland.

118. All of this serves to underline that this is a complex case in which, unless documentary or other firm evidence emerges to assist in establishing events, the court which determines the welfare issues about the children may have to hear a considerable amount of evidence in order to reach a clear picture of what has occurred in this family and to determine what is in the children's medium and long term best interests.

119. It is not the role of the court in Hague proceedings to carry out this sort of inquiry, however. As counsel for the father themselves observed in their skeleton argument for the appeal (§50), the expedition that is required in Hague cases does not permit a full investigation of welfare issues and normally the courts deal with such cases without hearing oral evidence and without resolving contested issues of fact. Such documentary material as can be assembled may assist but it may be limited because of the constraints of time. There is also limited scope for the parties to file further statements responding to material as it comes to light. The evidence will inevitably be imperfect but the judge has to take a view about it, assisted by submissions, in order to reach the decisions that have to be taken. The

authorities are punctuated with reminders of the summary nature of the proceedings and that it would not be true to the spirit of the Convention if the courts allowed applications to become bogged down in protracted hearings and investigations. It would not serve the interests of the children either.

120. If Mrs Justice Roberts did, in fact, intend to make findings as such about what had occurred in the family home, in my view they could not prevent a subsequent court, armed with much more material and with the inestimable benefit of hearing oral evidence, arriving at different conclusions. There was considerable support for such findings from the CAFCASS officer and the judge reached her conclusions despite careful cross-examination bringing out certain improbable aspects of the children's accounts. Following the first instance hearing, the report of social services has added further support. However, I am well aware of the father's vehement rejection of the allegations made about his conduct and conscious that other evidence may also come to light from other quarters.

121. It is always difficult for a judge in Hague proceedings to know what to do about factual disputes but the experienced judges of the Family Division usually find a way through which will do justice in a summary fashion without prejudicing the parties, the children or the prompt resolution of the proceedings. For present purposes, I propose simply to leave Mrs Justice Roberts' findings to one side because it is not necessary, in my view, for the purposes of exercising the discretion in this case, to determine the truth or otherwise of what the children say. Feelings can be genuine and strong, even if they are in fact baseless. What matters is that the children genuinely have such fears which are strongly held. J's emotional state, in particular, is extremely worrying.

122. I return therefore to consider the factors that are relevant to the exercise of discretion. The judge thought that the availability of protective measures, in the form of undertakings and of orders that could be made by the Irish courts, was crucial and I will start with that feature. There is no doubt that such protective measures are relevant. Furthermore, I will proceed for the moment on the basis that the judge was entitled to conclude that they would be effective, although I do not ignore the mother's argument that the judge was wrong to find that they would be adequate to guard against the risk of harm to the children if they returned. But, in my view, there were (and remain) difficulties that would not be addressed by the measures, however effective they proved to be in practical terms.

123. The principal difficulty is that the protective measures available might well not address the children's fears quickly enough or at all. The children have shown themselves to be afraid of a return to Ireland and also of their father and, whether or not the detail of their descriptions was accurate, their fears appear to derive from traumatic experiences at home. It might be hoped that experiencing the reality of life in Ireland, in a separate household from the father, with protection through the Irish courts and with contact reintroduced under their supervision, would prove reassuring to them but this would be unlikely to be instant and, in the interim, the children would not feel safe.

124. I think it probable that J's position, in particular, would take time to change. J was in what the judge described as a "highly emotionally charged state" which prevented him from making a clear and balanced assessment of his situation. True

it is that there was no psychological assessment of him for the court but the reason for that was made plain and, in any event, given the summary nature of Hague Convention proceedings, time may not always (or even often) permit the luxury of such an assessment. There was, however, abundant evidence of the extreme difficulties that he was suffering. They were referred to, inter alia, in the concluding paragraphs of the CAFCASS report.

125. It appeared to be accepted that at the time of the hearing before Mrs Justice Roberts, J was about to have an initial assessment by CAMHS following a referral by his general practitioner. §51 of the CAFCASS report set out what the mother had said to Ms Bennett-Hernandez about the recent developments that had led to that. They included, according to the mother, that J had threatened her with a knife and tried to harm himself. This, if correct, would be particularly worrying, given J's statement in his letter to the judge about suicide. Even accepting that services could be provided for him in Ireland, returning there would disrupt his treatment and, as the judge acknowledged at §71 of her judgment, the timing of his access to similar facilities in Ireland remained unclear. The father invites our attention to new information from the general practitioner in Ireland by way of reassurance on this front but it does not remove the anxieties that are bound to be felt about disrupting the existing arrangements for a child in J's emotional state.

126. All in all, the children's feelings about a return to Ireland are therefore a very important factor in the discretionary equation and the nature of the evidence is such that in this case, they weigh heavily, in my view, against a return.

127. In saying this, I acknowledge that it cannot be said that the evidence points uniformly in one direction. The children's apparent response on resuming contact with their father by telephone from this country has to be taken into account but the CAFCASS officer did not consider that this was necessarily significant and thought that they were unlikely to have the capacity to respond differently. In evaluating the children's position in this respect, one should perhaps note the extent of their fears and that the fears were present not only when discussing matters with Ms Bennett-Hernandez but also, in the case of I and J, at school in England where both children displayed extreme reactions about their father. I's school reported that, in mid May, I told them that she was scared that daddy was coming to take her and hurt mummy and that he had found them (see E66 of the trial bundle); the school said that on one day she was "hysterical" and would not let go of her mother. J's school reported that on 16 May he was crying and expressing fears that his father would find him (see E68 of the trial bundle); he is said to have been "petrified".

128. The judge considered that the possibility of resuming a positive relationship with their father would be denied to the children so long as they remain here at an undisclosed location. She appeared to consider that that weighed in favour of them returning to Ireland although she accepted, quite rightly in my view, that considerable work may be required in the future for a resumption of the relationship to be achieved. I do not disagree that the impact on the children's relationship with their father of remaining here has to be taken into account as a factor in the discretionary exercise but I would not, on the facts of this case, give it the weight that the judge appeared to give it. And in terms of separation from family members, weight needs also to be given to the fact that a return to Ireland

would mean a separation from the children's elder brother, D, who would not be returning.

129. Another important matter to consider is the age of the children. The authorities make clear that it may be appropriate to give more weight to the views of an older child than a younger child. These children's ages vary but J is of an age when, particularly given his emotional vulnerability and the strength of his views, I do not think his objections can be lightly dismissed.

130. Hague Convention considerations are also a vital consideration at the discretionary stage. They are well known and include the benefits that flow for individual children and children in general from the swift return of abducted children to the place where they have been living (in this case for most of their lives), comity between contracting states, respect for one another's judicial processes, and the deterrence of abduction.

131. Counsel for the father invited our attention to the list of factors placed before the judge by Ms Chaudhry in her skeleton argument below. I take them into account together with the associated features of the case which I will describe alongside them. They commence at page 19 of Ms Chaudry's document.

132. In addition to matters that I have already covered, the factors listed included the fact that the children had always lived in Ireland before March 2014 and the role that the father had played in their lives up until then, including having had sole care of them on occasions and dropping them off at school and collecting them, all of which would be ended, at least for the time being, if the children were presently to remain here.

133. Ms Chaudhry also invited attention to the father's concerns about the mother's ability to care for the children. The father's most recent statement refers to the social work assessment dated August 2014 which was produced to us by the solicitor for J and D. It describes difficulties that the mother was having at that time with the children's behaviour and ways in which she would be supported to deal with them. The father says that the report bears out his fears and shows that the children are exhibiting problems which were not present when they lived in Ireland and that the mother is not properly controlling them. Ms Chaudhry submitted to Mrs Justice Roberts that the children's lives were far from settled in England; as well as exhibiting emotional problems that were not present, on the father's case, in Ireland, they were living in a refuge. The family's unsettled situation also emerges from the August social services' assessment.

134. The rather troubled picture of family life in England must be taken into account but there is little to enable a court at this stage to isolate the reasons for the problems and nothing to suggest that an enforced return to Ireland, against the wishes of the children and their mother and without D, would make matters any better. It would not, on any view, be a return to the former living arrangements but to temporary accommodation with only one of the two parents and in a situation of significant family conflict. It needs to be anticipated that such a step might even make things worse.

135. Ms Chaudhry also submitted to Mrs Justice Roberts that, for various reasons, the Irish courts (which have jurisdiction under Brussels IIa) would be best placed to conduct a welfare assessment with the children living in Ireland and that the father would not be well placed to litigate in England. I would observe that the Irish court can, of course, make orders notwithstanding our refusal to return the children summarily to Ireland.

136. Counsel for the father submitted to us that an exercise of discretion in this case was "always bound to result in an order for a return to Ireland" (see §74 of their skeleton argument). I do not accept that.

137. To my mind, having weighed up the various factors that are relevant, there are strong reasons to exercise the discretion not to order the return of J to Ireland, particularly in light of his age, his fears, the strength of his objections, and his emotional vulnerability. The case is perhaps less obviously compelling in relation to T, but having reached that conclusion in relation to J, I would not consider it appropriate to exercise the discretion differently in this case in relation to him, particularly when the consequence would be that he would have to leave behind both of his elder brothers to make the return to which he too is opposed. As I indicated earlier, I do not propose to determine I's position in the context of her objections. As I have said, it seems to me self-evident that if none of her brothers are returning, it would place her in an intolerable (and to her probably unintelligible) situation if she were to be returned.

138. I would therefore allow the appeals and substitute for the judge's order an order dismissing the father's application for the return of the children to Ireland.

Joinder of children as parties to an appeal

139. There remains for determination only the procedural issue about the joinder of the children as parties to appeal proceedings.

140. It is imperative that consideration is given at the earliest possible stage in Hague Convention proceedings to whether the appropriate parties are before the court. That always means considering the position of the children who are the subject of the application. In this case it also meant considering the position of D. In considering his position, it is important to remember that he too is a child for the purposes of the procedural rules although no longer within the scope of the 1980 Convention.

141. No question seems to have been raised of any of these children being joined as parties to the proceedings until after Mrs Justice Roberts gave judgment. J and D first consulted their solicitor on 7 July 2014.

The legal framework

142. Baroness Hale provided indispensable guidance on the subject of the participation of children in Hague Convention proceedings at §§60 to 62 of Re D and §57 of Re M, as did Lord Wilson in Re LC, commencing at §45. Both were concentrating, however, on the position at first instance, which I will examine briefly here.

143. Sometimes a sibling will necessarily be a respondent in the proceedings at first instance by virtue of Rule 12.3(1) of the FPR 2010. That rule sets out, in table form, who may make applications and who the respondents will be. In relation to proceedings for an order under the 1980 Hague Convention, the respondents listed include various specific categories of person and "any other person who appears to the court to have sufficient interest in the welfare of the child". In W v W (Abduction: Joinder as Party) [2010] 1 FLR 1342, Baker J considered the similarly worded pre-cursor to this provision (r 6.5 of the Family Proceedings Rules 1991), the child's 17 year old sibling having argued that she was a mandatory defendant in the father's Hague Convention proceedings because she was concerned about the welfare of her sibling and took a protective role in relation to him. He drew upon observations made by Potter P in S v B (Abduction: Human Rights) [2005] EWHC 773 (Fam), [2005] 2 FLR 878 which he found strongly persuasive. He concluded that in order to be entitled as of right to be joined as a defendant, an applicant must establish that he or she "is directly concerned with the welfare of the subject child in the sense that they have: (1) provided care for the child; and/or (2) have a continuing or potential interest in the provision of care for the child; or (3) have some legal or practical responsibility for the child's welfare". In In re E (Children)(Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144, the Supreme Court also referred to the provision, simply citing the words of the rule and commenting that it "was for the judge to weigh whether she had such a sufficient interest".

144. I do not propose to consider whether the approach taken by Potter P and Baker J might have been too restrictive an interpretation of the plain wording of the rule. The whole debate as to whether or not D should have been a party to the proceedings below is arid. Whatever the position under Rule 12.3(1), there is no doubt that the court would have had power to join D as a party if it had been asked to do so. Rule 16.2(1) FPR 2010 provides that the court may make a child a party to proceedings if it considers it in the best interests of the child to do so. I would not be inclined to accept the argument advanced by Mr Turner QC for the father that that rule only applies to the joinder of children who are the subject of the proceedings, although the point was not fully argued so I do not decide it definitively. There is, in any event, a general power under Rule 12.3(3) to make any person a party. But in this case, neither D nor anyone on his behalf sought an order joining him at first instance. Furthermore, his lack of participation at that stage has since been remedied by his joinder in the appeal proceedings which has given him the opportunity to put forward his case fully with the benefit of expert representation and which has produced the result for which he contended.

145. I turn therefore to the issue of the children's participation for the first time in the Court of Appeal.

146. There was no dispute that there was binding Court of Appeal authority establishing that the children could in principle be permitted to bring their own appeal, even though they had not been parties in the court below, see for example George Wimpey Ltd v Tewkesbury Borough Council [2008] 1 WLR 1649, referred to in Re LC by Lord Wilson at §11. Neither was there any dispute that they could be joined as parties for the first time at the appeal stage of proceedings.

However, the procedural framework for their participation is possibly somewhat deficient.

147. The FPR 2010 deal comprehensively with the participation of children in proceedings but it was agreed between the parties that when the question of the participation of a child arises for the first time at the Court of Appeal stage, it is not the FPR 2010 which apply but the CPR 1998, which do not cover the ground as thoroughly.

148. I have already referred to Rule 16.2 FPR which provides that the court may only make a child a party if it considers that it is in the child's best interests to do so. There is no equivalent provision in the CPR. Rule 19.1 and 19.2 CPR provide:

> "19.1 Any number of claimants or defendants may be joined as parties to a claim.
>
> 19.2 (1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period).
>
> (2) The court may order a person to be added as a new party if –
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.
>
> (3) The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings.
>
> (4) The court may order a new party to be substituted for an existing one if –
>
> (a) the existing party's interest or liability has passed to the new party; and
>
> (b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings."

149. Rule 52.1 defines "appellant" and "respondent" for the purposes of part 52 as follows:

> "(d) 'appellant' means a person who brings or seeks to bring an appeal;
> (e) 'respondent' means –
> (i) a person other than the appellant who was a party to the proceedings in the lower court and who is affected by the appeal;

> and
> (ii) a person who is permitted by the appeal court to be a party to the appeal;"

It includes no guidance at all as to when a person should be permitted by the appeal court to be a party to the appeal, let alone any guidance tailored to the situation of a child who wishes to participate. This does not mean, in my view, that welfare considerations are irrelevant to the decision whether to join the child; they are, as I observed in Re LC, "by no means out of place". But they are not necessarily determinative and there is no best interests threshold such as there is in the FPR. Although not strictly applicable, I see no reason why regard should not be had to the guidance provided in Practice Direction 16A of the FPR to the extent that it may prove useful in the rather different circumstances of the Court of Appeal and the specialist sphere of Hague Convention proceedings. Lord Wilson referred to it at §§50 et seq of Re LC and I will not rehearse it further here.

150. Neither is there any equivalent in the CPR to the provisions of the FPR which require or permit a guardian to be appointed for a child. It may be that the provision in CPR Rule 52.10(1) whereby, in relation to an appeal, the Court of Appeal has all the powers of the lower court, would provide a basis for the appointment of a guardian. But that does not arise for decision in this case. Adequate protection for the child's interests on an appeal can generally be achieved in any event by means of a litigation friend appointed in accordance with Part 21 CPR.

151. Part 21 CPR deals with children and protected parties. A 'child' means a person under 18 years of age (Rule 21.1(2)(b)). Rule 21.2(2) provides that a child must have a litigation friend to conduct proceedings on his behalf unless the court makes an order under Rule 21.2(3) permitting the child to conduct the proceedings without. Rule 21.2(4) provides that an application for an order under Rule 21.2(3) can be made by the child. If the child already has a litigation friend, it must be made on notice to the litigation friend but may otherwise be made without notice. The court may appoint a litigation friend by order (Rule 21.6). Alternatively, Rules 21.4 and 21.5 deal with becoming a litigation friend without an order.

152. The functions of a guardian are well understood by family practitioners and are set out in the FPR. CAFCASS guardians (often with a social work background) are the most familiar guardians but they are not the only type. Lord Wilson observed in Re LC that, had Cobb J made T a party to the first instance proceedings in that case, she would have been required to act by a guardian but that such a status might have been conferred on her solicitor. He also observed (§55) that the grant of party status to a child leaves the court with a wide discretion to determine the extent of the role which he or she should play in the proceedings. He explained the sort of involvement he would have contemplated had T been a party and said that it would have been for her guardian to decide which of the documents filed in the proceedings should be shown to T.

153. The functions of a litigation friend are no doubt fully understood in the usual civil context in which the system operates although the researches of counsel did not produce any authorities to enlighten us further about how they actually carry out their functions or as to the principles that the court should apply when deciding

whether to order that a litigation friend is not necessary. How a litigation friend is to function in the very different environment of an appeal in a Hague Convention case is rather more opaque. No guidance is to be found about that.

154. Fortunately, this area of work is well served by very experienced solicitors who are familiar with these sorts of proceedings and extremely capable of looking after the interests of the children affected by them. In this case, the solicitor for J and D was appointed as their litigation friend and appears to have been able to discharge that role efficiently and without encountering any difficulties in practice. This sort of arrangement may often commend itself where the question of joining children at the appeal stage arises.

155. Children need to know that their views are being listened to and that their particular concerns are not being lost in the argument between their parents but it must be recognised that direct participation in proceedings can be harmful for children. As Lord Wilson said in §48 of Re LC, "[t]he intrusion of the children into the forensic arena….can prove very damaging to family relationships even in the long term and definitely affects their interests". I therefore contemplate that it may be necessary for a litigation friend to guide and regulate the child's own participation in the proceedings, just as a guardian would. He or she will no doubt determine which documents filed in the proceedings should be shown to the child and take decisions, in consultation with the child, about whether the child should attend the court hearing. In the very unlikely event that an intractable issue arises between the litigation friend and the child, there may be no alternative but to ask the court to give directions, but I would expect such a situation to be extremely rare. What I do not think a litigation friend can do is provide a welfare assessment for the court in relation to the child as a guardian would do. However, where the litigation friend is the child's solicitor, as I anticipate will be so in the vast majority of cases, he or she will no doubt assess the case and guide and support the child in their approach to the litigation, as any solicitor would do for an adult client.

156. I end this section of my judgment with a cautionary note. It should not be expected that an application for children to be involved in proceedings, either as appellants or as respondents, for the first time in the Court of Appeal will be received sympathetically. By the time the matter reaches the Court of Appeal, it is usually far too late in the day to address this sort of issue. I have said several times already, and make no apology for saying again, that this needs to be thought of at the very outset of the proceedings. As to how an application made at that stage may fare, nothing that I have said in this judgment is intended to affect the existing jurisprudence on the subject.

157. It follows from what I have said that even with the benefit of fuller consideration of the question, I would have followed the same course in relation to the joinder of the children as I in fact followed pragmatically and with the sensible and helpful concurrence of all parties at the directions hearing in July.

Ryder LJ:

158. I agree.

Richards LJ:

159. I also agree.

APPENDIX

EXTRACT FROM RE T (ABDUCTION: CHILD'S OBJECTIONS TO RETURN) [2000] 2 FLR 192, COMMENCING AT PAGE 202

"*The child's objections: the proper approach to the question*

Re S (A Minor)(Abduction: Custody Rights) 1993] Fam 242, sub nom S v S (Child Abduction)(Child's Views) [1992] 2 FLR 492 is the leading authority and the following principles can be derived from the judgment of the court given by Balcombe LJ:

(1) The part of art 13 which relates to the child's objections to being returned is completely separate from para (b) and there is no reason to interpret this part of the article as importing a requirement to establish a grave risk that the return of the child would expose her to harm, or otherwise place her in an intolerable situation.

(2) The questions whether: (i) a child objects to being returned; and (ii) has attained an age and a degree of maturity at which it is appropriate to take account of its views, are questions of fact which are peculiarly within the province of the trial judge.

(3) It will usually be necessary for the judge to find out why the child objects to being returned. If the only reason is because it wants to remain with the abducting parent, who is asserting that he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of discretion.

(4) Article 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. (As a matter of fact, the child in Re S, whose objections prevailed, was only nine years old.)

(5) If the court should come to the conclusion that the child's views have been influenced by some other person, for example the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views.

(6) On the other hand, where the court finds that the child has valid reasons for her objection to being returned, then it may refuse to order the return.

(7) Nevertheless it is only in exceptional cases under the Hague Convention that the court should refuse to order the immediate return of a child who has been wrongfully removed.

As to the difficult problem of deciding whether a child is mature enough, Waite LJ helpfully said in Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819, 827:

'When Article 13 speaks of an age and maturity level at which it is appropriate to take account of a child's views, the inquiry which it envisages is not restricted to a generalized appraisal of the child's capacity to form and express views which bear the hallmark of maturity. It is permissible (and indeed will often be necessary) for the court to make specific inquiry as to whether the child has reached a stage of development at which, when asked the question "Do you object to a return to your home country?" he or she can be relied on to give an answer which does not depend upon instinct alone, but is influenced by the discernment which a mature child brings to the question's implications for his or her own best interests in the long and the short-term.'

Thus it seems to me that the matters to establish are:

(1) Whether the child objects to being returned to the country of habitual residence, bearing in mind that there may be cases where this is so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated. Hence there is a need to ascertain why the child objects.

(2) The age and degree of maturity of the child. Is the child more mature or less mature than or as mature as her chronological age? By way of example only, I note that in Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716 Ewbank J's decision that boys aged seven and a half and six were mature enough was upheld by Balcombe LJ and Sir Ralph Gibson, Millett LJ dissenting. I would not wish to venture any definition of maturity. Clearly the child has to know what has happened to her and to understand that there is a range of choice. A child may be mature enough for it to be appropriate for her views to be taken into account even though she may not have gained that level of maturity that she is fully emancipated from parental dependence and can claim autonomy of decision-making. The child's 'right' - and I use the word loosely - is, consistently with art 12 of the United Nations Convention on The Rights of a Child 1989, to have the opportunity to express her views and to be heard, not a right to self-determination. Article 12,

which is often judged to be one of the most important in that convention, assures to children capable of forming their own views:

'….the right to express those views freely in all matters affecting [them], the views of the child being given due weight in accordance with the age and maturity of the child.'

The sentiments in both Conventions are the same and they give strong support to the idea that the purpose of the exception to the general rule of immediate return is to defer to the wishes of the child for Convention purposes, even if the child's wishes may not prevail if welfare were the paramount consideration. Thus once the child is judged to be of an age and maturity for it to be appropriate for the court to take account of her views then the art 13 defence is established and the court moves to the separate exercise of discretion as it is required to be conducted under the Hague Convention. Each case will, of course, depend upon its own facts.

(3) So a discrete finding as to age and maturity is necessary in order to judge the next question which is whether it is appropriate to take account of child's views. That requires an ascertainment of the strength and validity of those views which will call for an examination of the following matters, among others:

(a) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is her views which have to be judged appropriate.

(b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?

(c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent?

(d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?"

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