

Ciccone v Ritchie (No 1) [2016]

[2016] EWHC 608 (Fam)

03/02/2016

Barristers

Henry Setright KC
Private: David Williams QC
Michael Gration KC
Jacqueline Renton

Practice Areas

International Children Law
Private Children Law
Approved Judgment

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

.....

THE HONOURABLE MR JUSTICE MACDONALD

The judge has given permission for this version of the judgment to be published, including the names of the parties and of the child. There is a reporting restriction order in force in respect of this case. Permission to publish this version of the judgment is given expressly subject to the terms of the reporting restriction order.

Mr Justice MacDonald:

Introduction

1. These are proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter the Convention) in relation to Rocco John Ritchie, who is now aged 15 years and four months. Rocco is the son of Ms Madonna Ciccone and Mr Guy Ritchie. This is the mother's application under the Convention for the summary return of Rocco to the jurisdiction of the United States and, specifically, New York State. The mother alleges that the father wrongfully retained Rocco in this jurisdiction on 6th December 2015.

2. I also note at this point that proceedings in respect of Rocco have also been commenced in New York State. There is a hearing pending in those proceedings in respect of an order originally made in proceedings in the United Kingdom but ratified and certified in New York State for the purposes of enforcement. I will say a little more about that order below. It is important to note that I am told that Rocco will be represented within the proceedings in New York by an attorney for children.

3. On the last day of term, at the conclusion of a very busy urgent applications list, the mother's

application came before me for the first hearing on short notice to the father and to those representing Rocco. On that day I determined, amongst other issues, an application made by Rocco to be joined as a party to these proceedings.

4. Having heard submissions from all parties I granted Rocco's application to be made a party as being in his best interests. Given the time in the evening at which the hearing concluded I delivered my decision with short reasons and indicated that I would give my detailed reasons later. I now do so.

Essential Background

5. The parents were married in December 2000. A divorce petition was issued in September 2008 and Decree Absolute was given in January 2009. The arrangements for Rocco were agreed by way of a consent order approved by the Senior District Judge in the Principal Registry of the Family Division in February 2009.

6. That consent order provided that the mother have permission to permanently remove Rocco and his younger brother to the United States of America. The order further provided that Rocco would spend time with the father in the terms set out in the order. Pursuant to the terms of that order Rocco moved to the United States to reside with his mother and his siblings.

7. On 27 March 2009 the order of the Senior District Judge was registered in the State of New York by the Supreme Court of the State of New York, by which registration the order of the Senior District Judge is deemed to have the same force and effect as an order of, and is enforceable as if it were issued by, a court of the State of New York.

8. In November 2015, pursuant to the order agreed between them, the parents settled the arrangements for Rocco to spend time with his parents during the Christmas period.

9. Rocco was due to spend time with his mother from 6 December 2015. Rocco did not return to the mother on that date and remains in the care of the father. Rocco has indicated through his solicitors that he does not wish to return the United States at this time.

10. The parties have, to their great credit, endeavoured to resolve the ensuing impasse amicably by engaging in mediation assisted by a team of two mediators proposed by Rocco's solicitors. It is important to note that Rocco has been involved fully in that mediation process. Unfortunately, despite the efforts of the parties, mediation was ultimately unsuccessful and on 18 December 2015 the mother issued her application under the 1980 Convention seeking the summary return of Rocco to the United States of America.

11. Rocco now applies for party status in the proceedings commenced by that application. The application for party status is advanced on behalf of Rocco by Mr. Henry Setright QC and Mr. Edward Devereux. The application is supported by the father, represented by Mr. Michael Gration. The application is opposed by the mother, represented by Mr. David Williams QC and Miss Jacqueline Renton.

The Submissions

12. On Rocco's behalf Mr. Setright QC and Mr. Devereux submit that it is in Rocco's best interests to have the status of a party to these proceedings in order to enable him to participate fully in proceedings that have the potential to affect fundamentally his future.

13. Mr. Setright characterises this case as unusual in circumstances where Rocco is over 15, and therefore very near the upper age limit for Convention proceedings, the outcome of which may be the summary return of Rocco to the United States, where Rocco, through an expressed wish not to return,

considers himself to be the instigator of the circumstances that ground the alleged retention and where Rocco has been, to date, intimately involved in the efforts to achieve a mediated resolution of this matter.

14. Within this context, Mr. Setright emphasises that Rocco wishes to participate actively as a party in the decision making process that will have a fundamental effect on his future, as opposed to passively through the medium a Cafcass report setting out his wishes and feelings. On behalf of Rocco, Mr. Setright says that Rocco does not want what he says filtered either through a Cafcass Officer or the respective cases of his father or mother whereby it is inevitable that the nuances of Rocco's position will be diluted. Rather, Rocco wishes to be able to argue his position and to be able to respond to the arguments advanced by his mother and father as they respond to what he has said, a wish that would be frustrated by a report from Cafcass that permitted only a passive indication of his wishes and feelings.

15. More immediately, Mr. Setright argues that party status will permit Rocco to participate directly in the decisions that fall to be made at this hearing, the most pressing of which is whether I should utilise s 5 of the Child Abduction and Custody Act 1985 as a means of ordering contact between Rocco and his mother over the Christmas period.

16. Mr. Setright further points out that both parents have considered it appropriate for Rocco to participate fully in the process to date through his involvement in mediation and that his mother has invited the court to appoint a legal representative to represent Rocco in the proceedings in the United States. Party status for Rocco is therefore, Mr. Setright submits, consistent with his parents' position to date, which position has been to involve Rocco consistently.

17. Having regard to his involvement in the mediation process and his representation by a lawyer in the proceedings in New York, Mr. Setright argues that it would be detrimental to Rocco for him to be in a wholly different position in the very proceedings constituted to decide whether he should be summarily returned to the United States against his wishes. Within this context, Mr. Setright argues that it would be positively harmful to Rocco were he to be denied participation and for the court then to decide to return him to the United States and expect him to be content with that decision and co-operate with it. Mr. Setright further argues that, in circumstances where Rocco has already instructed solicitors, there will be no delay caused by joining Rocco as a party.

18. Finally, Mr. Setright contends that party status will add significantly to the court's understanding in this case. In particular, Mr. Setright today lays down a marker that Rocco will seek to argue the issue of habitual residence, which issue cannot be properly considered without Rocco being joined as a party. In addition, if the court were to order Rocco to return, Mr. Setright argues that party status would confer on Rocco the ability to articulate fully to the court, and to participate in discussion and negotiation of, the adjustments to his life in the United States arising out of the matters set out in Ms. Ray's statement and on any issues regarding how enforcement of an order for return should be achieved.

19. I have before me a statement prepared on behalf of Rocco by Ms. Peggy Ray of Goodman Ray solicitors. In that statement Ms. Ray observes that "[Rocco] is 15 years and four months old. He will be 16 in August 2016. He is a mature, articulate and reflective young man and fully competent (in my assessment) to instruct a solicitor direct and has done so throughout the course of the last three weeks."

20. The father supports the application by Rocco for party status. In his oral submissions, Mr. Gration emphasised on behalf of the father that the precipitating factor in this case was Rocco's decision and that, in the circumstances, it is Rocco who is best placed to advance through his lawyers that position before the court. Mr. Gration further submitted that the court must balance the potential harm of

involving Rocco in the arena of these proceedings and the adverse impact of not allowing him to be involved. Finally, Mr. Gration submitted that Rocco's position falls squarely within the categories of case which may justify making the child a party that are set out at paragraphs 7(b), 7(d) and 7(e) of FPR 2010 PD16A.

21. In response to Rocco's application, Mr. Williams QC and Miss. Jaqueline Renton on behalf of the mother, questioned the manner in which Rocco had come to find himself represented by solicitors, suggesting that the father, having retained a solicitor for Rocco, is now sheltering behind him. Within this context, Mr. Williams argues that Rocco should not, as a vulnerable 15 year old child, be drawn further into the arena of these proceedings and that mere age is not a reason for joinder. The father denies using Rocco as a proxy.

22. Mr. Williams submits that Rocco can have his voice adequately heard in these proceedings through the agency of a Cafcass report in the normal way, that process providing a clear channel through which Rocco's views can be heard and evaluated by reference to Rocco's maturity, the rationality of his views, his perspective and whether he has been the subject of influence. In this respect, Mr. Williams argues that Rocco will in any event have to see the Cafcass Officer for this work to be undertaken. In the circumstances, Mr. Williams submits that Rocco's participation can be properly secured by a report from an independent Cafcass Officer. Mr. Williams also argues that in this case that process would be bolstered further by the fact that a lawyer is to be appointed for Rocco in the proceedings in the United States.

23. Mr. Williams further argues that Rocco does not have a standpoint or perspective that is inconsistent with or is incapable of being represented by the father. Mr. Williams says that the father is in a position to argue the issue of Rocco's habitual residence (which Mr. Williams submits is, in any event, a 'bold' argument for Mr. Setright to posit). As to whether the joinder of Rocco would add significantly to the court's understanding of the case, Mr. Williams contends that it is difficult to see how this would be the case in what is, Mr. Williams submits, a relatively straightforward Convention case.

24. Finally, were the court to consider it appropriate to join Rocco, Mr. Williams submits that in any event the court must consider whether Cafcass should appoint a Children's Guardian and thus Rocco could be represented by a lawyer from the Cafcass High Court team. Mr. Williams concedes that joinder would not result in delay in this case.

The Law

25. In *Re F (Abduction: Child's Wishes)* [2007] 2 FLR 697 the Court of Appeal made clear that there should, in every case and at the first directions hearing, be an enquiry into the child's wishes and feelings being placed before the court. That is the task with which I am here engaged.

26. In *Re D (A Child)* [2007] 1 AC 619, Baroness Hale observed as follows in relation to the importance of listening to children involved in children cases:

"There is 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 reason for failing to hear what the child has to say than it is for refusing to hear the parents' views."

27. In Convention proceedings there are a number of different ways for the child's views to be brought before the court, and Mr. Williams QC has outlined those for me during the course of his submissions. What may be described as the primary channels consist of an interview with an officer of Cafcass, face to face communication with the judge or, finally, being made a party to the proceedings. In *Re D (A Child)* at [60] Baroness Hale expressed the following view regarding the use of these methodologies:

"60 There are three possible ways of doing this. They range from full scale legal representation of the child, through the report of an independent CAFCASS officer or other professional, to a face to face interview with the judge. In some European countries, notably Germany, it is taken for granted that the judge will see the child. In this country, this used to be the practice under the old wardship system, but fell into disuse with the advent of professional court welfare officers who are more used to communicating with children than are many judges. The most common method is therefore an interview with a CAFCASS officer, who is not only skilled and experienced in talking with children but also, if practising in the High Court, aware of the limited compass within which the child's views are relevant in Hague Convention cases. In most cases, this should be enough. In others, and especially where the child has asked to see the judge, it may also be necessary for the judge to hear the child. Only in a few cases will full scale legal representation be necessary. But whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented."

28. Thus, in this jurisdiction, in most cases an interview of the child by an officer of Cafcass will suffice to ensure that the child's wishes and feelings are placed before the court and in only a few cases will party status be necessary.

29. As to the question of in which circumstances party status may be necessary, as can be seen from the passage cited above in *Re D (A Child)*, Baroness Hale held that wherever it seems likely that the child's views and interests may not be properly presented to the court, and, in particular, where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented.

30. In *Re M and Another (Children)(Abduction: Rights of Custody)* [2008] AC 1288 at [57] Baroness Hale, having held that in 'settlement' cases under Art 12 of the Convention separate representation should be routine, expressed the view that in all other cases the question to be considered was whether the separate representation of the child will add enough to the court's understanding of the issues that arise under the Hague Convention to justify the intrusion, expense and delay that may result.

31. In *Re LC (Reunite: International Child Abduction Centre Intervening)* [2014] AC 1038 the Supreme Court again considered the question of when it will be necessary to join a child as a party to proceedings under the 1980 Hague Convention, examining that question within the context of Part 16 of the Family Procedure Rules 2010 such rules having then come into force.

32. Rule 16.2 of the FPR 2010 provides as follows with respect to making a child a party to the proceedings:

"16.2 When the court may make a child a party to the proceedings

(1) The court may make a child a party to proceedings if it considers it is in the best interests of the child to do so.

(2) This rule does not apply to a child who is the subject of proceedings-

- a. which are specified proceedings; or
- b. to which Part 14 applies.

(The Practice Direction 16A sets out the matters which the court will take into consideration before making a child a party under this rule)."

33. In *Re LC (Reunite: International Child Abduction Centre Intervening)* at [45] Lord Wilson emphasised that under Part 16 of the FPR the test for granting party status to a child in proceedings is whether it is in the child's best interests to do so:

"On any view it is most unusual for the threshold criterion for the making of a case management decision to be a conclusion about a person's best interests. But the meaning of the rule is plain. The best interests of the child represent the threshold criterion and are not just a "primary consideration" as stated in paragraph 7.3 of Practice Direction 16A supplementing FPR Pt 16 . If, and only if, the court considers that it is in the best interests of the child to make her (or him) a party, the door opens on a discretion to make her so. No doubt it is the sort of discretion, occasionally found in procedural rules, which is more theoretical than real: the nature of the threshold conclusion will almost always drive the exercise of the resultant discretion."

34. As to the matters that will inform the best interests decision, Lord Wilson further observed in *Re LC (Reunite: International Child Abduction Centre Intervening)* at [50] that although Practice Direction 16A is not focused on proceedings under the 1980 Convention much of what is contained in that Practice Direction is directly apposite to such proceedings.

35. Within this context, Lord Wilson emphasised at [51] in *Re LC (Reunite: International Child Abduction Centre Intervening)* that paragraph 7.1 of the Practice Direction:

"...makes clear that a grant to a child of party status will be made only in cases which involve an issue of significant difficulty and thus only in a minority of cases. Consideration, so it suggests, should first be given to whether an alternative course might be preferable; and the suggestion is well reflected by the court's current practice of inviting an officer in the CAFCASS High Court team to see the child before it decides whether to make her a party to Convention proceedings."

36. Lord Wilson further emphasised at [52] in *Re LC (Reunite: International Child Abduction Centre Intervening)* the need to have regard to paragraph 7.3 of the Practice Direction dealing with the issue of delay:

"Paragraph 7.3 of the Practice Direction stresses that a grant to a child of party status may result in delay adverse to her welfare and of which account should therefore be taken. This factor has a particular relevance to Convention proceedings. The need for expedition is written into article 11.3 the Convention; and the aspiration, articulated in the same paragraph, for determination within six weeks of issue is, in the case of EU states, stiffened by article 11.3 of B2R, which positively requires determination within that period save in exceptional circumstances."

37. Lord Wilson highlighted the guidance at paragraph 7.2 of the Practice Direction as having particular significance for the question of the joinder of the child in Hague Convention proceedings, noting that the paragraph offers the following non-prescriptive guidance on the circumstances which may justify a grant to a child of party status:

"7.2 The decision to make the child a party will always be exclusively that of the court, made in the light

of the facts and circumstances of the particular case. The following are offered, solely by way of guidance, as circumstances which may justify the making of such an order –

- (a) where an officer of the Service or Welsh family proceedings officer has notified the court that in the opinion of that officer the child should be made a party;
- (b) where the child has a standpoint or interest which is inconsistent with or incapable of being represented by any of the adult parties;
- (c) where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;
- (d) where the views and wishes of the child cannot be adequately met by a report to the court;
- (e) where an older child is opposing a proposed course of action;
- (f) where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child;
- (g) where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court;
- (h) where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of an officer of the Service or Welsh family proceedings officer;
- (i) where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position;
- (j) where there is a contested issue about scientific testing.”

38. In *Re LC (Reunite: International Child Abduction Centre Intervening)* Lord Wilson made clear at [53] that paragraph 7.2(e) of Practice Direction 16A concerning an older child opposing a proposed course of action should not be taken as to endorse any routine grant of party status to older children objecting to return in Convention proceedings. Further, whilst in *Re M and Another (Children)(Abduction: Rights of Custody)* Baroness Hale stressed that the aims of Art 12 of the United Nations Convention on the Rights of the Child should be given greater emphasis in cases concerning a child’s objection under Art 13 of the 1980 Convention, it is important to note that Art 12 recognises that by the terms of the article the child’s right to participate may be met otherwise than by means of direct participation in proceedings, Art 12 of the United Nations Convention on the Rights of the Child providing as follows:

“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.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

39. With respect to cases in which the question of the child’s habitual residence is in issue, in *Re LC*

(Reunite: International Child Abduction Centre Intervening) at [49] Lord Wilson observed as follows regarding the interrelationship in some cases between that question and the issue of whether the child should be joined as a party to the proceedings:

“In what follows I must in no way be understood to suggest that it should become routine to join as parties to Convention proceedings children whose habitual residence in the requesting state is in issue. Nevertheless, as Thorpe LJ prefigured in *Cannon v Cannon* [2005] 1 WLR 32, para 55, there is an analogy between, on the one hand, an inquiry into some degree of integration of a child in the social and family environment of the requesting state during a short period of residence there and, on the other, an inquiry into a child’s settlement in the environment of the requested state. To both inquiries an older child may in particular be able to contribute relevant evidence not easily given by either of the parents, namely about her state of mind during the period in question; see again *Cannon v Cannon*, at para 61.”

40. Wider advantages arising out of the child being made party to proceedings have been recognised in the case law. In the case of *Mabon v Mabon* [2005] 2 FLR 1011 at [44] Wall LJ recognised that party status can, in an appropriate case, allow the child to emerge from the proceedings with the knowledge that his or her position has been independently represented and his or her perspective fully advanced to the judge. In the same case Thorpe LJ said as follows at [23]:

“The applicants were at the date of judgment aged respectively 17, 15 and 13. What remained was a disposal hearing. As Mr. Overall eloquently put it, without separate representation how were they to know what their parents were contending for: were there cross-applications for residence, what were the contact applications? It was simply unthinkable to exclude young men from knowledge of and participation in legal proceedings that affected them so fundamentally. They had been seen by an experienced family practitioner who had no doubts as to the sufficiency of their understanding: hardly surprising given that they are educated, articulate and reasonably mature for their respective ages.”

41. It is also important to recognise that there are also plain disadvantages to children becoming party to proceedings. In *Re LC* (Reunite: International Child Abduction Centre Intervening) Lord Wilson highlighted [48] that:

“The intrusion of the children into the forensic arena, which enables a number of them to adopt a directly confrontational stance toward the applicant parent, can prove very damaging to family relationships even in the long term and definitely affects their interests. So does delay in the resolution of the issue whether they should be ordered to return, albeit perhaps only temporarily, to the requesting state.”

42. Equally, however, denying a child the knowledge of and participation in continuing proceedings may, in some cases, also be to risk emotional harm to that child (see *Mabon v Mabon* [2005] 2 FLR 1011 at [29]).

43. Finally, when considering whether conferring party status is in a child’s best interests it is important to bear in mind the forensic differences between the various methods by which the child’s views can be brought before the court. In this context, in *Re C* (Abduction: Separate Representation of Children) [2008] 2 FLR 6 at [44] Mr Justice Ryder (as he then was) observed as follows:

“It is persuasively argued before me that it would be emotionally harmful for the court not to empower these children not only to put their views before the court but also to have them properly, independently and specifically, advocated. However expert any CAFCASS officer may be in obtaining a child’s views, much will depend on the way that officer elicits those views i.e. what questions he asks and how he interprets the answers. That officer is not able to advocate a child’s views within the proceedings and in

particular to respond to evidence and submissions as they unfold, giving the child's position where appropriate. The process of reporting does not allow a child to engage in the proceedings..."

Discussion

44. Having listened to the careful and considered submissions in this case, I have come to the conclusion that it is in Rocco's best interests to be joined as a party to these proceedings for the following reasons.

45. Rocco is the subject of these proceedings and those in the United States of America. Out of all those involved in this case, it is Rocco who, in circumstances where these proceedings may result in his summary return to the United States against his expressed wishes, has the closest interest in their outcome. This can of course be said of all children who find themselves the subject to proceedings under the Convention. However, Rocco is in my judgment in a very different position to most such children.

46. Rocco is 15 years and four months old and is, accordingly, close to the upper age limit that has been placed on the jurisdiction conferred by the 1980 Hague Convention. Ms. Ray (who is a children's solicitor of unrivalled experience) is satisfied that Rocco is a mature, articulate and reflective young man and fully competent in her assessment to instruct a solicitor direct, as he has now been doing for three weeks.

47. Within this context (and accepting that the motivation for Rocco's decision and, in particular, the question of whether he has been the subject of influence remain live issues to be determined in this case) Rocco is, on the face of it, the instigator of the circumstances that ground the alleged retention.

48. Having taken his decision, Rocco states he has a very clear view as to the outcome he desires in these proceedings. In short, his case is that he opposes a return to the United States at this time.

49. I have, of course, had regard to the matters set out in FPR 2010 Practice Direction 16A and I note in particular para 2.7(e). Whilst in no way automatic in its application in child's objection cases under the Convention, FPR 2010 PD16A para 2.7(e) makes clear that such circumstances may justify the making of an order joining a child as a party to proceedings depending on the particular circumstances of the case.

50. In this case, having made clear his decision and his opposition to return to the United States, Rocco has already been instrumental, through his solicitors, in instigating, and has been intimately involved in efforts to achieve a mediated resolution of the consequences of that decision. As I have noted above, Rocco has been extensively involved with his solicitor for an extended period. Rocco is in attendance at court today and I decided, as a preliminary issue, that he should be present for his own application to be joined as a party. I am told he will be represented in the proceedings in New York by a children's attorney.

51. Within this context, Rocco has a very clear wish (and, in the circumstances I have described above, now a perhaps not unreasonable expectation) to contribute actively as a party to the decision making process that will have a fundamental effect on his future, as opposed to passively through the medium of a report setting out his wishes and feelings. Rocco wishes to be able to argue his position positively and to be able to respond to the arguments advanced by his mother and father as they respond to what he has said, the same way he has been able to through his solicitor to date, during the course of mediation. In short, having been involved closely in the attempt to resolve his future by mediated agreement, he wants earnestly to participate in the legal proceedings that now appear to be required to achieve that end.

52. Having regard to this position, I am satisfied that to now confine Rocco to a passive role in these proceedings (as he would surely see it in the context of the nature and extent of his involvement in the process to date) would not be in his best interests and, indeed, would be detrimental to him.

53. Having been at the centre of the process that seeks to resolve his future it would in my judgment be confusing for Rocco, and would risk engendering in him an undesirable sense of grievance, or even injustice, for the court to stipulate that he should now be placed in a wholly different and largely passive position in the very proceedings constituted to decide whether he should be summarily returned to the United States against his wishes. I can quite see how uncomfortable, frustrating and even upsetting it would be for Rocco as a mature, articulate and reflective young man with apparently strong views as to his future to now have to wait, whether literally or metaphorically, outside in the corridor whilst the adults who had previously engaged him fully in the process discuss and decide his future. I am satisfied that it is in Rocco's best interests to avoid this situation arising.

54. I accept the submission of Mr. Setright that such a position would be likely to have a detrimental effect on Rocco, especially when one considers that a possible outcome of these proceedings is that this court could order in due course his summary return to New York. Within this context, I am further satisfied that not only would such a position be detrimental to Rocco during the course of the proceedings but that it also has the potential to affect him adversely thereafter. Mr. Setright is right to pose the question how, were this court to decide to order Rocco's return to the jurisdiction of the State of New York, having denied Rocco's request to participate as a party to that decision, could the court legitimately expect Rocco to accept that decision, to respect it and to co-operate with it? Such a situation would, I am satisfied, simply exacerbate the difficulties already inherent in seeking to compel a child of Rocco's age to return against their will were that to be the court's decision. Again, I am satisfied that it is in Rocco's best interests to avoid this situation arising.

55. Within this context, in my judgment there is a further potential benefit to permitting Rocco to be a party to these proceedings, albeit it is a benefit that may or may not become manifest depending on the decision of the court on the substantive application. As Baroness Hale noted in *Re D (A Child)*, it is the child, more than anyone else, who will have to live with what the court decides. In my judgment, Rocco will find it far easier to recognise the legitimacy of court's decision on the issue of whether or not he must return to the United States if he feels he has been able to participate fully in the process by which that decision is made. This is particularly important in circumstances where one option open to the court is to order the return of Rocco notwithstanding his objection. Within this context, party status for a child of Rocco's age and maturity, and thus for Rocco, has the potential to mitigate the difficulties that ordinarily attend any decision to return an older child over his or her objections.

56. I have of course considered very carefully indeed Mr. Williams' submissions on behalf of the mother as to the risk of permitting Rocco to enter into directly the arena of these proceedings. The court must not, of course, have regard simply to the age of a child in deciding whether the child's best interests are met by being separately represented. The court has to, and does, balance against the benefits of representation the adverse effect of allowing the child to descend into the arena. I am in this case however satisfied that the advantages of permitting Rocco to become a party to these proceedings outweigh the potential detriments to him of taking that course of action.

57. In addition to the matters that I have already set out above regarding the disadvantages of denying, and the potential benefits of granting, party status to Rocco, as Mr. Setright rightly points out Rocco is in this case in a different position to many children in respect of whom an application for party status is advanced.

58. As I have already noted at a number of points during this judgment, Rocco has been, with the acceptance of both his parents, involved intimately in the mediation process which has continued up to the date of this hearing, and therefore has been at the centre of the issues and arguments that have been rehearsed between the parents. This is not a case therefore where Rocco starts from a position of

a child who is remote from, or insulated from, the dispute that has arisen regarding his future. The risks arising from being drawn into the arena therefore, in my judgment, carry less weight in this case than might ordinarily be the case.

59. I have also considered very carefully Mr. Williams submission that Rocco can have his voice adequately heard in these proceedings through the agency of a Cafcass report in the usual way. However, I am not satisfied that Mr William's makes good his submission having regard to the very particular circumstances of this case.

60. Whilst highly experienced in ascertaining, evaluating and recording the child's views, a Cafcass Officer tasked with preparing a report on the child's wishes and feelings is not able to advocate a child's views within the proceedings on an ongoing basis nor, in particular, to respond to evidence and submissions as they unfold, giving the child's (possibly evolving) position where appropriate. The process of reporting does not allow a child to engage proactively in the proceedings by advancing arguments and responding to arguments made by his or her parents.

61. For the reasons I have set out above, within the context of Rocco's age, the level of Rocco's involvement in the process to date and the apparent strength of his views, I am satisfied that it is important not only to place his wishes and feelings before the court in these proceedings, but to allow him to be able to respond to what is said by others about the wishes and feelings he has expressed. As a mature, articulate and reflective teenager with a strong sense of his own agency I am satisfied that Rocco needs to emerge from these proceedings, whatever their outcome, satisfied that he has participated as fully as possible in the making of the decisions that will fundamentally affect his future and with the fullest possible understanding of why those decisions have been made.

62. Within this context, participation in these proceedings by means of an interview with a CAFCASS Officer and the reduction of his strongly held wishes, feelings and arguments to a paper report would for Rocco be a pale and, I am satisfied, a frustrating, disappointing and potentially distressing, imitation of the degree of participation he has experienced to date, which frustration, disappointment and potential distress would further feed into the problems and potential problems that would flow from denying him party status as identified above.

63. Mr. Williams rightly reminds me that the ordinary course in applications for the joinder of children to proceedings under the Convention is for Cafcass to be instructed to prepare a report to look at the issue of whether the child should be made a party. However, once again in this case the position is different to that which ordinarily pertains.

64. Since 30th November 2015 those representing Rocco have done a great deal of the work that would ordinarily be expected to be done by Cafcass in order to put the court in a position to consider the application for party status that now comes before the court. To start again at this point with the standard procedure (which procedure, whilst good practice to be adopted in the vast majority of cases, is not mandatory) would, in my judgment, introduce unnecessary delay.

65. Finally, I am satisfied that conferring on Rocco party status will add significantly to the court's understanding of the issues that fall to be determined in this matter. Not only will being a party to the proceedings allow Rocco's position to be articulated to the court by his representatives on the basis of the very detailed instructions that he has given his solicitor to date, but the court will also gain a 'moving picture' of Rocco's position, views and feelings in response to his parents' arguments concerning that position and his objections as the case progresses. This is a situation that would not pertain in circumstances where Rocco's wishes and feelings were provided by way of the 'still photograph' that

comprises a Cafcass report on wishes and feelings.

66. I am also satisfied that, in circumstances where Rocco intends to argue the issue of habitual residence, this is a case in which Rocco will be better able than either of his parents to contribute relevant evidence to the court about his state of mind during the period relevant to the determination of that issue.

67. Finally, were the court to order his return to the United States, party status will also allow Rocco to better articulate to the court, and the court to better understand, any adjustments to Rocco's life in the United States to smooth his return and any issues arising as to how enforcement of an order for return should be achieved. Matters into which, in any event, a young person of Rocco's age and maturity should have significant input.

Conclusion

68. There will only be a limited number of cases under the 1980 Hague Convention in which it is appropriate for the child to be joined as a party to the proceedings. For the reasons I have given above, I am satisfied that this case is one of that limited number. I have concluded that it is in Rocco's best interests to be joined as a party to these proceedings and I so join him.

Ancillary Directions

69. FPR 2010 r 16.6, which makes provision for a child to act in proceedings without a children's guardian or litigation friend, does not apply in Hague Convention proceedings (see FPR 16.6(2) and *Re LC (Reunite: International Child Abduction Centre Intervening)* at [46]). Accordingly, whilst this apparent lacuna in the rules has been recognised as such (see *WF v FJ (Abduction: Child's Objections)* [2011] 1 FLR 1153 at [21] – [22]) a child who is joined to Convention proceedings is required to act by a Children's Guardian. This is, however, a status which can be conferred upon Rocco's solicitor (see *Re LC (Reunite: International Child Abduction Centre Intervening)* at [46]).

70. An issue arose during the course of the hearing as to whether, in circumstances where a child is joined as a party to proceedings and represented by a solicitor who is also appointed his or her Guardian, it is necessary to have a report from Cafcass on the question of whether the child's objections are authentic, as opposed to the product of influence by the parent who has allegedly abducted the child, and the extent to which the objections coincide with, or at odds with the child's welfare. As I said during the course of giving my brief reasons on the evening of 23 December 2015, I would have liked to have had the opportunity to explore this issue in more depth during submissions. This was not possible due to the constraints of time.

71. Whilst the 'gateway stage' of the child's objections defence 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, at the discretion stage the court must consider not only the nature and strength of the objections but a much wider range of considerations including whether they are authentic as opposed to the product of influence by the parent who has allegedly abducted the child and the extent to which the objections coincide with, or are at odds with the child's welfare (see *Re M and another (Children)(Abduction: Rights of Custody)* [2008] AC 1288 and *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children to Appeal)* [2015] EWCA Civ 26).

72. Within this context, it does seem to me on the face of it (and without having heard detailed submissions on the point) that a solicitor who is representing an articulate and mature child joined to the proceedings, and who is bound to take and act on instructions from that child in advancing his or her

case, might be placed in a difficult position if required by the court also to provide an evaluation of such issues as whether the objection their client instructs them to advance is authentic as opposed to the product of influence by the abducting parent or as to the extent to which the objections coincide with, or are at odds with their client's welfare. This is particularly so where, as in this case, the child instructs his or her solicitor that his decision is free from influence and consistent with his welfare.

73. In these circumstances, and whilst in no way seeking to lay down any general principle or rule, it seems to me that, notwithstanding that Rocco is represented by a solicitor who is also appointed as his Children's Guardian, the assessment of whether Rocco's objections are authentic as opposed to the product of influence by his father and the extent to which Rocco's objections coincide with, or are at odds with his welfare remains properly the task of a Cafcass Officer.

74. In the circumstances, I will direct a report from Cafcass dealing with the issue of whether Rocco objects to a return to the State of New York to include consideration of the matters relevant to the court's determination of the weight to be given to any objection under Art 13 of the Convention.

75. That is my judgment.

Permission

 **Family Law Week**