Neutral Citation Number: [2023] EWCA Civ 1449

Case No: CA-2023-001088

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
MRS JUSTICE THEIS
FD22P00737

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 December 2023

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LADY JUSTICE ELISABETH LAING

C v M (A Child) (Abduction: Representation of Child Party)

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Ruth Kirby KC, Adele Cameron-Douglas and Miriam Best (instructed by **Brethertons LLP**) for the **Appellant**
Mark Jarman KC and Mani Basi (instructed by **Dawson Cornwell**) for the **First Respondent**
Christopher Hames KC, Indu Kumar and Charlotte Baker (instructed by **Goodman Ray Solicitors**) for the **Second Respondent**
Deirdre Fottrell KC, Lorraine Cavanagh KC, Siobhan F Kelly and Sharon Segal (instructed by **ITN Solicitors**) for the **Association of Lawyers for Children** the **First Intervener**
Henry Setright KC and Harry Langford (instructed by **Mills and Reeve LLP**) for the **Reunite International Child Abduction Centre** the **Second Intervener**

Hearing dates: 25 and 26 July 2023

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Approved Judgment

This judgment was handed down remotely at 14.00pm on 1 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The father appeals from the order made by Theis J ("the judge") on 18 May 2023 dismissing his application for a summary return order under the 1980 Hague Child Abduction Convention ("the 1980 Convention"). This order followed a rehearing of the father's application, a previous order having been set aside by the judge on 4 April 2023.

2. The father's application under the 1980 Convention sought the return of two children, aged 12 ("X") and 6 ("Y"), to Mauritius from where they had been wrongfully removed by the mother in October 2022. The application was first determined on 3 February 2023, when the judge made a summary return order. The judge decided that Article 13(b) had not been established and that, while X objected to returning to Mauritius, she would exercise her discretion, for the reasons set out in her judgment, by making a return order. The judgment is reported as: *C v M* [2023] EWHC 208 (Fam) ("the February 2023 judgment").

3. On 15 March 2023, X applied to be joined as a party and to set aside the return order. X was joined as a party and Ms Broadley was appointed to act as her solicitor-guardian. Neither the mother nor the father opposed either of these orders. As referred to above, on 4 April 2023 the judge set aside the summary return order she had made on 3 February 2023. The judgment is reported as: *C v M & Another (Hague Abduction: Application for Re-hearing)* [2023] EWHC 1482 (Fam) ("the April 2023 judgment").

4. The father's application was reheard on 4 and 5 May 2023. At that hearing, the father sought the summary return of both children or, in the alternative, of Y alone. The mother and X opposed the order, relying on X's objections and Article 13(b). It was agreed that X objected to returning to Mauritius. In her judgment, handed down on 18 May 2023, reported as *C v M and another* [2023] EWHC 1182 (Fam) ("the May 2023 judgment"), the judge set out her reasons for deciding that the father's application should be dismissed in respect of both children. In summary, this was based on the exercise of her discretion arising as a result of X's objections and on her conclusion that Article 13(b) was established in respect of both children.

5. This appeal was heard at the same time as the appeal in another case which appeared to raise similar issues as to the role of a solicitor-guardian, including as to the proper scope of their evidence, when acting for a child in proceedings under the 1980 Convention. Judgment in respect of the other appeal is reported as: *D (A Child), Re (Abduction: Child's Objections: Representation of Child Party)* [2023] EWCA Civ 1047 ("*D (A Child)*"). As explained in that judgment, at [4], the broad nature of the issues led to Reunite International Child Abduction Centre ("Reunite") and the Association of Lawyers for Children ("the ALC") being given permission to intervene by way of written and oral submissions.

6. As set out in *D (A Child)*, at [69], in response to the issues identified in these appeals, it was proposed that Sir Andrew McFarlane P "should consider setting up a committee" to address and make recommendations in respect of:

> "(i) whether r.16.6(1) of the Family Procedure Rules 2010 ("the FPR 2010") should be extended to apply to proceedings under the 1980 Convention; (ii) the appropriate role in such

> proceedings of a solicitor appointed also as a child's guardian; and (iii) any other recommendations as to the process which should be adopted in respect of a child being joined as a party to such proceedings."

It was made clear that this was "suggested wording only and [was] not intended to be prescriptive as to the matters which any such committee might consider it appropriate to address". It was also explained in that judgment that Reunite's and the ALC's submissions would be dealt with in this judgment.

7. The father was represented on this appeal by Ms Kirby KC and Ms Cameron-Douglas and by Ms Best (who did not appear below), both of whom appeared at the May 2023 hearing below; the mother was represented by Mr Jarman KC and Mr Basi who, together with their instructing solicitor, acted pro bono at the hearing below and on this appeal; and X, who acts through her solicitor-guardian Ms Broadley, was represented by Mr Hames KC and Ms Baker (the latter of whom appeared at the May 2023 hearing). Reunite was represented by Mr Setright KC and Mr Langford and the ALC by Ms Fottrell KC, Ms Cavanagh KC, Ms Kelly and Ms Segal. I am grateful to all counsel for their respective submissions.

8. Ms Kirby's oral submissions focused on whether the judge had been entitled to rely on Ms Broadley's evidence. It was submitted that the judge had wrongly relied on her opinion evidence which was inadmissible as she was not an expert. It was also submitted that, in effect, the judge had wrongly "allowed" that evidence "to replace Cafcass". However, there are five grounds of appeal, which cover a more diffuse range of issues, and which I set out as they appeared in the Skeleton Argument in support of this appeal:

> (1) There was a material procedural irregularity when the Judge refused the proposed appellant's application to adjourn the re-hearing of his application so that the court could hear from Cafcass and so that Cafcass could comment on a number of issues relevant to the exercise of the court's discretion;
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> (2) The Judge was wrong to exercise her discretion based on her welfare concerns for the child without further and updating evidence from Cafcass based on an alleged change of circumstances for the child. She was wrong to substitute the expert, objective, child-focused opinion that would have been provided by Cafcass with the opinion evidence of the child's solicitor Janet Broadley, and written hearsay evidence from the child's head teacher;
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> (3) In exercising her discretion to refuse to order the return of either child to Mauritius, the Judge attributed disproportionate weight to the child's stated objection to a return, an objection that was no different in substance at the re-hearing to the objection the child had expressed in January. The Judge failed to attribute any or any appropriate weight to a number of other material considerations;

> (4) The Judge was wrong not to insist that the mother confirm to the court whether, if the court ordered Y's return to Mauritius, the mother would return with one or both children; and wrong to assume the mother would not return in such circumstances;
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> (5) It was improper, in the exercise of her discretion, for the Judge to take into account the proposed appellant's alleged level of insight into alleged domestic abuse.

Background

9. The background is dealt with in detail in the judgments below. As summarised in the April 2023 judgment:

> "The father was born and brought up in London. Both parents are dual Mauritian and British citizens and the mother was born in Mauritius and came to the United Kingdom in 2000. The parents married in 2003. Both children were born here. The family lived here until 2019. The family went to Mauritius in 2019. There is an issue between the parents as to whether that was en route to Singapore, or for a longer stay in Mauritius. In any event, it is agreed one of the main reasons for the stay in Mauritius was to renew the mother's passport, which could only be done in person. That took longer than expected and events overtook when the travel restrictions were imposed as a result of the COVID-19 pandemic."

10. In November 2020, the parents separated while in Mauritius. The mother and the children remained living with the maternal grandparents while the father went to live with his mother. As set out in the February 2023 judgment: "The father continued to have contact with Y, seeing him every weekend … X only participated in indirect video-call contact, which stopped in about November 2021". Then:

> "In June 2022 the father had instigated court procedures in Mauritius to seek contact with X. He made a 'request to the court' on 7 June 2022 and on 10 June 2022 both parties attended court-based mediation, where the parties agreed when the father came to the home to collect Y he would see X for up to 30 minutes. According to the father, that arrangement did not work with X and he was in the process of making a formal court application when he received the letter from the mother's English solicitors dated 7 October 2022 stating she had left with the children."

11. On 6 October 2022 the mother wrongfully removed the children from Mauritius and brought them to England without any prior notice to the father. They have remained here since then.

Proceedings

12. The father's proceedings under the 1980 Convention were issued on 15 November 2022. Both parties filed statements; expert evidence was obtained in respect of the enforcement of protective measures in Mauritius; and a report was provided by Ms Callaghan, from the Cafcass High Court team. The latter report was directed to address the children's views, wishes and feelings in respect of returning to Mauritius; their maturity; whether either of them should be separately represented; and whether either of them wanted to meet the trial judge.

13. In her report, Ms Callaghan set out that X wanted to remain in England and not return to Mauritius. She analysed what X had said and concluded that X "appears to have aligned herself closely with her mother, however I consider her views to be authentic". She did not consider that either child should be separately represented and neither of them wanted to meet the judge.

14. At the final hearing in January 2023, the judge heard oral evidence only from Ms Callaghan. In her February 2023 judgment, as referred to above, the judge decided that Article 13(b) was not established. She carefully analysed the matters relied on by the mother and decided that "the range of protective measures" proposed by the father would be sufficient to ameliorate the risk that would otherwise arise. As part of the protective measures, the judge required a joint application to be made to the court in Mauritius, in accordance with the expert evidence, so that "the undertakings offered by the father can be in an enforceable form prior to [the children's] return". In respect of X's objection to returning, the judge took the protective measures and other matters into account when deciding to exercise her discretion by ordering that X should return to Mauritius.

15. As referred to above, X then instructed Ms Broadley directly. An application was made on her behalf, first for disclosure of the papers and then to be joined as a party and for the return order to be set aside. Ms Broadley filed two statements, dated 8 and 15 March 2023, and a statement from X's headteacher was also provided. Ms Broadley's second statement was filed pursuant to the judge's order of 9 March 2023 for evidence to be filed in support of the proposed application for X to be joined as a party and for the return order to be set aside. This statement dealt, among other matters, with Ms Broadley's assessment of "the depth and extent of [X's] wishes and feelings and her objection to a return to Mauritius". Both statements included much opinion evidence which is now criticised by Ms Kirby.

16. X was joined as a party and Ms Broadley was appointed as her solicitor-guardian on 16 March 2023. At the subsequent hearing on 4 April 2023 the return order was set aside. The judge decided, as explained in her April 2023 judgment, that there had been a fundamental change of circumstances which justified the order being set aside. In making that determination, it is clear that this was based significantly on the evidence from Ms Broadley and from X's headteacher including as to Ms Broadley's assessment of X's wishes and feelings. It is also clear that there was no objection to this evidence being adduced or relied on in the manner in which the judge did. The father's application for permission to appeal from that decision was dismissed by Baker LJ on 28 April 2023. Ms Broadley's role in the proceedings and the admissibility and relevance of her evidence were not raised in that application.

17. The judge listed the rehearing for 4/5 May 2023. The order made by the judge on 4 April 2023 also included the following recital:

> "The father does not seek to separate the children … in the event the court determines that [X] should not be returned to Mauritius pursuant to the 1980 Hague Convention. In light of the father's position the Court determined that an addendum Cafcass report was not necessary for the purpose of the re-hearing on 4th May 2023."

It was additionally provided that the father's solicitors should "notify the other parties and the clerk to Mrs Justice Theis by 4pm on 28 April 2023" whether they sought permission for oral evidence to be given by any witness. No such notification was given.

18. We were also referred to an email which had been sent on behalf of the Cafcass High Court Team to counsel in the morning of 4 April 2023 in response to an earlier telephone call from the child's counsel. In his submissions, Mr Hames explained how this had arisen. Ms Broadley had instructed him to raise with the other parties' counsel at the hearing on 4 April the issue of whether Cafcass should be further involved. By agreement, this led to the telephone call to Cafcass in which they were asked whether they could provide a further report in time for the hearing on 4/5 May 2023. In their reply, Cafcass queried whether a further report was "a proportionate and necessary exercise" because X had been "deemed competent to instruct a solicitor guardian and therefore any updated views she has will be put before the court". Further, it was noted that there "is an impact on children and young people of having to meet with Cafcass repeatedly" and it was questioned how X "would experience this repeated exercise in addition to meeting her solicitor guardian to discuss her views within these proceedings". A request was made that these issues be considered by the court and, if a further report was required from Cafcass, suggestions were made as to how this might be directed. As referred to above, no further report was in fact ordered.

19. As set out in the May 2023 judgment, at [33], on 3 May 2023 counsel for the father emailed the court. Reference was made in the email to a number of matters including the "absence of a Cafcass addendum report". In addition, the father's solicitors "emailed Ms Callaghan asking whether she would be available to attend the hearing the following day. She responded saying she was not available". It was also indicated on behalf of the father that he considered, "if an order is made that the children do not return to Mauritius … '*that it will bring an end to his relationship with both children*'" (emphasis in original). He had, therefore, decided that, contrary to his previous position, he would seek an order for Y's return even if the court decided not to make an order in respect of X.

20. At the start of the hearing on 4 May 2023, at [36], "the father did not seek an adjournment, he sought clarification as to X and the mother's position if the court ordered Y to be returned and not X". There was then a short adjournment after which an application was made on behalf of the father "for an adjournment, permission to file further evidence, a direction for a further Cafcass report and a three-day listing in about seven weeks". The judge refused the application. She noted in her judgment, at [69(6)], that:

> "The welfare enquiry sought by the father as part of his adjournment application sought to introduce within this summary process full welfare evidence that is more commensurate with a contested application within the jurisdiction that is required to determine issues regarding the long term care arrangements. That is not the purpose of the summary Hague Convention proceedings, which are aimed at securing (subject to Article 13 defences) the child's swift return for decisions to be made in that country as to the child's long-term future."

21. The judge also noted, at [62], that she had determined in April 2023 that:

> "there had been a fundamental change in the circumstances which was more than just a variation of matters known at the time of the hearing in January 2023, due to the different quality and nature of the evidence than the court had at the January hearing regarding X's wishes."

The "evidence" which the judge had relied on in her April 2023 judgment and to which she was again referring was the evidence of Ms Broadley and X's headteacher.

22. The May 2023 judgment dealt with the evidence from Ms Broadley and the headteacher at length. I repeat that no objection or issue was raised as to the admissibility and relevance of this evidence. I set out the paragraphs from that judgment in which the judge dealt with Ms Broadley's evidence:

> "[22] In that first statement Ms Broadley states that she agrees with Ms Callaghan's assessment as to X's maturity and that she did not present as having been coached by her mother. Ms Broadley continues in her first statement *'Indeed when I initially spoke to [X] it was clear to me that her mother had not discussed any aspect of the proceedings with her. [X] did not have any idea what has happened in the course of these proceedings, what had been ordered or why. She knew little about the Hague Convention and the process. Whilst this is to the mother's credit, the resultant effect is that [X] feels completely shut out of decisions made about her and feels that she has not been heard properly.'* Ms Broadley set out her experience in representing children in international child abduction proceedings and her assessment of X's competence to instruct her. She agrees with Ms Callaghan that X's maturity is commensurate with her age and her headteacher's description of X's maturity as *'sophisticated maturity beyond her years'*. In Ms Broadley's view *'It is the earnestness and strength in which she conveys her wishes and feelings and why she feels the way she does and that it is consistent with what she believes is right for her which satisfies me without doubt that [X] is competent to instruct me. [X] is a naturally guarded person when she speaks but the more you speak to her the more she opens up and conveys how she feels with quiet conviction … In my view, her level of maturity*

and level of understanding and her ability to reflect upon in a mature manner her short, medium and long term interests, demonstrates to me a very quietly determined and capable young person'.

[23] In her second statement, dated 15 March 2023, after Ms Broadley had the opportunity to consider the trial bundle, the note of Ms Callaghan's evidence and further discussions with X she states that X *'instructs me in a very assured, compelling, clear and heartfelt terms that she will not go back to Mauritius. This is not said in a churlish or disrespectful way. [X] carries a gentle and sweet sincerity in how she expresses herself in her belief that that she has not been heard effectively in these proceedings as she struggles with how and why the court would order her return to Mauritius, she would say, a return which would take her away from a country which she strongly identifies as her home.'* Ms Broadley considers X has the intelligence to comprehend the Hague process and a court order being made, it is at an emotional level with which X *'struggles'*. Ms Broadley distinguishes X from other children who have sought her advice in similar circumstances. Ms Broadley considers *'There is immense anguish and confusion which [X] appears to have internalised, dealing with it by deflecting away from facing those feelings and memories'*. Ms Broadly stated she was not surprised by Ms Callaghan's evidence that X kept deflecting from talking about Mauritius save in a superficial way, and considers it may be a coping mechanism for X, coupled with the fact that she only met Ms Callaghan once and Y was present. As Ms Broadley sets out *'For whatever reason, the depth and extent of [X's] wishes and feelings and her objection to a return to Mauritius was not evident when the matter came before this court for final determination; but it is clearly evident now … Her anxiety and anguish at the prospect of her going back has clearly heightened and changed with her suffering sleepless nights, crying every day … The strength of her feeling caused her to research being represented by her own solicitor and seeking help from her teacher, teaching assistant and head teacher. She felt unable to turn to her mother and in fact she currently refuses to talk to her mother … When I suggested her mother may have been shielding her from court proceedings she refused to accept this describing times when she has felt the need to protect her mother from her father's, at times' violent and abusive behaviour. Whilst she instructs me that she loves her mother dearly she sadly does not have any confidence in her mother's ability to protect her and her brother from harm … She herself describes being the focus of his anger and outbursts and later he behaves normally as if nothing has happened which also frightens her. She will not return to Mauritius and refuses to feel that sense of fear and dread again*'.

> [24] In her second statement, Ms Broadley gives an overview from X's perspective of life in England, relocation to Singapore, the time spent in Mauritius from September 2019 and in England from October 2022.
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> [25] Ms Broadley states *'[X] does not believe that her mother realises how distressing a prospect of returning to Mauritius is for her. [X] is really very upset with her mother for keeping things from her and genuinely does not believe that she will protect her from harm in Mauritius and this is why she has turned to her school for support. She cries as she thinks that neither of her parents really care for her and [Y]. This is her genuine feeling and said with some force'*." (emphasis in original)

At para [26], the judge also recorded that the father took "issue with many aspects of the account given by X in Ms Broadley's statement about her father and the time in Mauritius. He considers he and X had a loving relationship prior to the parties' separation in November 2020 and he has produced a number of videos to demonstrate that".

23. The judge summarised the law and no issue is raised as to the accuracy of that summary. She also set out the parties' respective submissions in detail. I do not propose to repeat them in this judgment but I note, again, that it was not submitted that Ms Broadley's evidence was not admissible. In essence, it was submitted on behalf of the father in respect of X's objections that, at [48], they were "really no more than further examples of the evidence the court considered in January"; that, at [58], the "case has all the hallmarks of unnecessary involvement of children in litigation"; and, at [59], that "the real issue is whether the court's discretion should be exercised in a different way". In respect of the latter, at [59]-[60], a number of factors were relied on in support of the court's discretion being exercised in favour of making a return order.

24. The judge set out, at [64], her reasons for concluding that the discretion which arose because of X's objections to returning to Mauritius should be exercised by refusing to make a return order. The reasons are detailed and lengthy. The judge decided that the "nature and quality of X's objections have changed" and that "the impact of a return on X, in the light of the updating evidence, will be significant". In respect of the father's submission that "the mother has orchestrated recent events", the judge decided that:

> "Whilst I can't rule out X being influenced by her mother's position I accept the evidence of Ms H and Ms Broadley regarding the level of X's distress they have witnessed, X's own account of the impact on her and Ms Broadley's experience in dealing with these cases together with her assessment that X's views are her own and they are clear, strong and compelling. X has remained resolute she will not return to Mauritius. The detailed account given by Ms Broadley in her statement is balanced and compelling. The court has to be alive to the risks of the mother's influence, as was Ms Broadley, whose assessment that X was not being coached is accepted."

The judge's ultimate conclusion was expressed as follows:

> "(8) Whilst the policy considerations remain strong, in the light of the evidence the court now has they are, in my judgment, outweighed by the other evidence and considerations in this case. The court is very conscious of the points made by Ms Kirby about the involvement of children in these cases. Each case is fact specific and the court is alive to the risks of children becoming involved at the instigation of one parent or another. I am satisfied this is not one of those cases relying, in particular, on the evidence of Ms H and Ms Broadley. For whatever reason, whether due to Y's presence or needing more time to feel able to open up, X was unable to convey the strength of her objections in her meeting with Ms Callaghan. This is no criticism of Ms Callaghan but more likely due to X's particular circumstances and her characteristics. I have carefully considered whether X's position is being orchestrated by the mother and whilst I can't rule out the mother's position having some impact on X the evidence, when looked as a whole, supports X's wishes as reported by Ms H and Ms Broadley as being X's own wishes and feelings that are genuinely felt. There would, in my judgment, be significant emotional consequences for X if despite those clearly expressed wishes the court nevertheless made a return order. It would be more than the uncertainties, turmoil *'rough and tumble, discomfort and distress'* involved in everyday life, and would cross the line where, in the words of Baroness Hale, would then risk the Hague Convention being turned into an *'instrument of harm'* ." (emphasis in original)

25. The judge then considered the case in respect of Y and concluded as follows:

> "[66] Having carefully considered the wide canvas of evidence and the submissions of the parties, I have reached the conclusion that in the circumstances that exists now the Article 13 b defence is established and that the protective measures proposed will not prevent the children being put at grave risk of harm and/or be placed in an intolerable situation. Y has only ever lived with his sister, there is no suggestion they have other than a close sibling relationship. His mother has been his main carer, for over half his life, since November 2020. Whilst it is right he had regular weekly contact with his father until October 2022, which has effectively ceased following the unilateral removal by his mother, to remove him from those who have cared for him and been an integral part of his life will put him at grave risk of emotional harm and/or place him in an intolerable situation. I recognise he has an existing relationship with his father, knows his paternal grandmother and will have some familiarity with the surroundings the father proposes, however those factors would not, in my judgment, manage the risks arising from the separation from his mother and sister. I do not share the

> confidence the father has that the mother and X will follow and, in any event, that uncertainty alone is likely to increase the grave risk of harm to Y."

The judge additionally considered, at [67], Article 13(b) in respect of X and decided that it was established:

> "In relation to X, whilst I have reached my conclusion under the objections defence I consider the Article 13 b defence applies to her, as well. To order her to return against her express wishes, where the court has accepted that evidence, would undoubtedly place her at grave risk of harm. The protective measures proposed, which are largely in place, would provide some reduction in that risk but in my judgment, in the circumstances as they exist now, are now not sufficient that she would not remain at grave risk of harm."

26. The judge then, at [69], summarised her reasons for concluding that a return order should *not* be made in respect of either X or Y. Having regard to the father's case in support of his appeal, they included:

> "(1) The policy considerations remain an important factor for the reasons outlined above. This is particularly so due to the circumstances of the abduction and the impact that has had on the father's ability to maintain any relationship with the children, in particular Y.
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> (2) However, the court has to balance that with the wider welfare considerations for the children."; and
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> "(4) In relation to Y he has not lived without his sister or mother for the whole of his life. The evidence points to his place being firmly anchored within that arrangement and a consequent strong bond between the siblings. To separate him from the known stability of care, with the consequent grave risks to his emotional and psychological welfare would need to be clearly justified. The importance of the father's continued relationship with Y must, of course, be weighed in the balance, together with what the father alleges is the mother's lack of support in maintaining that relationship. Also, the father's proposals do involve some arrangements that would be familiar to Y (such as returning to accommodation he knows where his paternal grandmother lives) thereby providing some amelioration of the other considerations. Whilst it is right the removal of Y from Mauritius has had a detrimental impact on his relationship with his father, there are other ways that can be managed that would cause Y less harm than separation from his sister and mother. For example, part of the father's recent evidence is that he would come over to this jurisdiction to spend time with the children. There is no reason why that could still not take place, thereby providing a foundation for that relationship to be restored.

> (5) The father's confidence about the mother and X returning to Mauritius voluntarily is not shared by the court. Whilst it is recognised they would not want to be separated from Y it is contrary to Y's welfare, as well as X, for them to be put in that position. Until very recently the father did not support the separation of the children, he still does not but in the event of the court determining X does not return he seeks for that option to be considered. Having reached the conclusion about X based both on her objections and under Article 13 b it would be counter intuitive for this court to then endorse a course, as suggested by the father, that places pressure on X to return. This is not only inimical to X's welfare but also to Y, as the continued uncertainty with the real risk that there could be a long term separation between the siblings does not meet his welfare needs. If the father still maintains that position for Y to be returned to Mauritius that can be considered as part of a wider and more detailed welfare enquiry than is possible within these summary proceedings.
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> (6) This is a summary process and, as a result, has its limitations. A more detailed welfare examination, in the context of the long term arrangements for the children, may justify different orders, but that would be a matter for another court, if agreement cannot be reached. The welfare enquiry sought by the father as part of his adjournment application sought to introduce within this summary process full welfare evidence that is more commensurate with a contested application within the jurisdiction that is required to determine issues regarding the long term care arrangements. That is not the purpose of the summary Hague Convention proceedings, which are aimed at securing (subject to Article 13 defences) the child's swift return for decisions to be made in that country as to the child's long-term future."

The judge also addressed the father's case as to the potential impact of a return order not being made on his relationship with Y. The judge considered, at [69(7)], that the father's case "overstates the reality" including because of "the father's ability to come to this jurisdiction".

Submissions

27. The parties' respective submissions were as follows.

28. The focus of Ms Kirby's oral submissions in support of the father's appeal was, as referred to above, to challenge the judge's reliance on the evidence given by Ms Broadley about X's views although she also criticised the judge's reliance on the "written hearsay evidence" of the headteacher. It was submitted that Ms Broadley's opinion evidence as given in both her statements was, either entirely or largely, inadmissible or, alternatively, that it was wrong for the judge to place any weight on it. These submissions were connected with her submission that the judge should have adjourned the May 2023 hearing including so that a further report could be obtained

from Cafcass to deal with X's views, to respond to Ms Broadley's evidence and to address broader welfare matters such as if Y were to return to Mauritius without X or his mother.

29. It can be seen from the May 2023 judgment, and was accepted by Ms Kirby during the course of her oral submissions, that the admissibility of Ms Broadley's evidence was not questioned at any time up to and including the final hearing before the judge. This was a new point raised on this appeal. As is the point that the judge should not have attributed any weight to it; this was also a submission that was not made to the judge. I would also add that neither Ms Broadley nor the headteacher were cross-examined and no application was made that they be cross-examined.

30. Appreciating, no doubt, the potential consequences of this background history for her case on this appeal, Ms Kirby submitted that the manner in which the judge had relied on and had accepted Ms Broadley's evidence to reach her conclusions as set out, for example at [64], had been unexpected. She submitted that, for example, the judge had not been expected to conclude, based on this evidence, that X's views were genuine.

31. Considering Ms Kirby's submissions in more detail, it was submitted at its highest that in so far as Ms Broadley gave opinion evidence it was inadmissible as she was not an expert. Alternatively, it was submitted that Ms Broadley's evidence had trespassed into areas where "it did not belong". It had, therefore, been "inappropriate" for the judge to rely on this evidence for example when deciding whether, as set out at [64(2)], "the mother has orchestrated recent events" and when deciding, at [64(3)], what weight to give X's views.

32. Ms Kirby submitted that the judge had wrongly accepted and relied on Ms Broadley's evidence rather than the evidence given by Ms Callaghan. As referred to above, it was submitted that, in effect, the judge had wrongly "allowed" Ms Broadley's evidence "to replace Cafcass". Ms Kirby submitted that a Cafcass officer was best placed to provide evidence of a child's wishes and feelings because of their specific training and experience in contrast to the different training and expertise of a solicitor who is also acting as a guardian. This applied particularly to Ms Callaghan because of her previous involvement in the case. She would have been able to assess the nature and intensity of X's views and whether, for example, they were because she had aligned herself with her mother or had been influenced or coached. Ms Broadley was not, she submitted, in an equivalent position. An additional reason for limiting the evidence given by a solicitor-guardian was the potential conflict between the respective roles of a solicitor and of a guardian. This made it inappropriate for the same person to act as both.

33. Ms Kirby also submitted that the judge should have determined that there was "no real difference" between X's position as at the February 2023 hearing and her position as at the rehearing in May 2023 and that what had happened since the first hearing was caused by the mother having, "at best", not "managed" the court's decision appropriately and not having prepared X for a return to Mauritius. Further, the judge had attributed excessive weight to X's objections and had failed to attribute any, or any appropriate, weight to a number of factors including: the protective measures available in Mauritius; the circumstances of the children's removal from Mauritius; and the policy behind the 1980 Convention.

34. Submissions were also made in support of Ground (4), whether the mother would return to Mauritius if a return order was made in respect of Y, and Ground (5), the father's level of insight. As to the former, it was suggested that the judge should have insisted that the mother state whether she would or would not return to Mauritius if the court ordered Y to return. Alternatively, it was submitted that the judge should have presumed that the mother would return in those circumstances. The latter sought to challenge one aspect of the judge's conclusions, at [64(5)], namely that the father "does not demonstrate any recognition, from X's perspective, of the impact she reports such behaviour has had on her"; this being the "impact on X of what she reports she observed regarding the alleged abusive behaviour between her parents and what she alleges was directed towards her".

35. Ms Kirby also made submissions supporting the need for guidance about the role of a solicitor-guardian having regard to the potential conflict between their respective functions as a solicitor and as a guardian. She pointed to the practice having developed of solicitor-guardians giving opinion evidence without this being subject to any wider analysis or consideration. She referred to *Ciccone v Ritchie (No 1)* [2016] 4 WLR 60 ("*Ciccone v Ritchie"*) and to the guidance given in the Law Society's December 2019 Practice Note, *Acting in the Absence of a Children's Guardian* ("*2019 Practice Note*"). Although the latter only applies to the appointment of a guardian in "specified proceedings", Ms Kirby relied on the advice given, that the solicitor should not make recommendations on welfare, in support of her submission that there should be clearly defined limits on the role of a solicitor-guardian which should not extend to giving opinion evidence about a child's views or wishes and feelings. She also raised issues as to the potential waiver of legally privileged communications.

36. Mr Jarman's overarching submissions were: (a) that the judge did not fall into error in respect of any of her case management decisions (grounds 1 and 2); (b) that the judge did not fall into error in the manner in which she exercised her discretion (grounds 3 to 5); and (c) that the points now advanced in respect of Ms Broadley's evidence are new and should not be permitted because no complaint was previously made about that evidence and the judge was, accordingly, entitled to give it the weight which she did. He further submitted that the judge was particularly well-placed to determine the re-hearing, having dealt with the initial final hearing and the set aside application, and had been entitled to reach her decision for the reasons she gave.

37. As for the role of Ms Broadley, he took us through the chronology of the proceedings. There had been no objection to X being joined as a party to the proceedings or to Ms Broadley being appointed as her solicitor-guardian by the order of 16 March 2023. There had also been no objection to the content of Ms Broadley's statements, or of the headteacher's, at any stage of the proceedings until this appeal. It was clear that the judge had relied on these statements when deciding to set aside the return order in April 2023. The father had also not required any witness to attend the May hearing to give oral evidence or to be cross-examined.

38. In the light of this history, Mr Jarman submitted it was now too late to seek to raise issues about the admissibility of this evidence or the weight which might properly be given to it when these submissions had never previously been made. These points could have been, but were not, raised previously in the proceedings and it was too late now to seek to change the evidential basis on which the judge below had reached her decision.

39. Mr Jarman submitted that the judge was entitled to refuse the application for an adjournment and for further evidence to be obtained from Cafcass. Such evidence had not previously been sought, was not necessary and the determination of the proceedings would have been unreasonably delayed. In addition, the issue of whether a further report should be obtained from Cafcass had been addressed at the hearing on 4 April 2023. The relevant recital had been included after careful consideration. The judge had given the father time on the first day of the hearing so that he could adduce a further statement.

40. On the issue of the exercise of the judge's discretion, Mr Jarman referred to the observations of Lady Hale in *In re M and another (Children) (Abduction: Rights of Custody*) [2007] UKHL 55, [2008] 1 AC 1288 ("*Re M*"), at [43] and [46] (which I set out below). He submitted that, contrary to the father's case, the judge had weighed the relevant factors including the circumstances of the abduction, the policy considerations behind the 1980 Convention and the father's relationship with Y.

41. As for ground 4, Mr Jarman submitted that there was no obligation on the judge "to insist" that the mother decide what she would do in the event that a return order was made in respect of Y. The father's late change as to the separation of the children had put the mother in "an impossible position". The judge gave the mother time to consider her position but she was unable to decide in the time available to her. It was, therefore, wrong to seek to "blame" the mother and the judge's analysis, including as set out at [69(5)], was appropriate and justified.

42. Finally, Mr Jarman made submissions about the role of a solicitor-guardian, which I do not propose to set out. He noted that solicitors who act for children have a particular expertise and are used to having a child as a client. They are also used to assessing the capacity of children to give instructions. He raised a particular concern, namely what he described as the "clandestine" instruction of a solicitor by a child with the sanction of one parent only. He suggested that the potential involvement of, or contact with, a solicitor should be brought to the attention of the other parent at the earliest possible opportunity.

43. Mr Hames's submissions understandably overlapped with the submissions made by Mr Jarman. I should make clear that this was not because of any co-ordination but reflected the fact that they relied on many of the same points.

44. Mr Hames first reiterated the submissions made by Mr Jarman that the challenges now made in respect of Ms Broadley's evidence were new points raised for the first time on this appeal and should not be permitted. He relied, in particular, on the fact that the appointment of Ms Broadley as solicitor-guardian had not been opposed; that no complaint had been made about any aspect of her evidence in either of her statements, which had been filed prior to the hearing on 16 March 2023 and prior to the father's application for permission to appeal the April 2023 order; and that no application had been made to cross-examine Ms Broadley, or the headteacher, at any time. Mr Hames also referred to the email from Cafcass on 4 April 2023 in which it was questioned whether a further report was "a necessary and proportionate exercise", as referred to above.

45. Mr Hames further submitted that, in any event, Ms Broadley was entitled to give opinion evidence based on what she had observed or based on her impressions or

perceptions. She was entitled to give evidence on such matters as whether X's views were genuine and the judge was entitled to rely on such evidence. He accepted that there were matters on which it would be more appropriate for evidence to be given by a social worker such as welfare recommendations. However, in the present case, Ms Broadley had been cautious in her approach and had not strayed beyond what was appropriate.

46. As for grounds 1 and 2, Mr Hames submitted that the judge was entitled to reject the father's belated application for an adjournment. The judge's decision was within her case management powers and discretion. She was "well able to evaluate the changes" in X's position and properly to exercise her discretion based on the evidence available to her. Further evidence from Cafcass was not required to enable her to do so and the judge was entitled to rely on the evidence from Ms Broadley and the headteacher.

47. Mr Hames submitted, in respect of grounds 3 to 5, that there was no error in the manner in which the judge had exercised her discretion based on X's objection to returning to Mauritius, as set out in particular at [64], nor in the manner in which she had decided that Article 13(b) was established. Matters of weight are for the trial judge and she had carefully analysed the relevant factors and, as set out in her judgment, had balanced the relevant considerations when determining whether or not to make a return order, as set out at [69].

48. In respect of the position of a solicitor-guardian, Mr Hames submitted that it was "unusual" for a solicitor to act as a solicitor-guardian. He referred to what Lord Wilson said in *In re LC (Reunite International Child Abduction Centre intervening)* [2014] AC 1038 ("*Re LC*"), at [55], namely that: "A grant of party status to a child leaves the court with a wide discretion to determine the extent of the role which she should play in the proceedings". Mr Hames submitted that many of the issues raised as to the proper scope of the role of a solicitor-guardian were case management decisions which would depend on the facts of the individual case. He, accordingly, submitted that the court should be cautious about giving guidance.

49. I set out the submissions advanced on behalf of Reunite and the ALC so that they are recorded, including for the purposes of any review of the proper scope of the role of a solicitor-guardian.

50. The submissions advanced on behalf of Reunite covered a broad range of issues. They included the inevitable significance of the voice of the child in cases in which objections under Article 13 were relied upon. Reference was made to the Explanatory Report of Professor Elisa Pérez-Vera and Article 12 of the 1989 United Nations Convention on the Rights of the Child; models of representation in other jurisdictions; and international authorities.

51. In respect of models of representation, Reunite's written submissions set out the current practice when Article 13 of the 1980 Convention is potentially engaged:

> "It is the current practice where a child is considered to be of sufficient age where their views might be relevant to an Art. 13 objections defence for a CAFCASS report to be directed, usually at the first inter-partes directions hearing, with a specific direction for consideration to be given in that report by the

> member of the CAFCASS High Court Team to whether or not there is a need for separate representation. The reports also typically 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, and the exercise of the court's discretion."

It was submitted that this approach has "the obvious benefit that the recommendation [as to separate representation] is made by the officer who meets with, and reports on, the views of the child". It is also in accordance with the observations of Baker J (as he then was) in *WF v FJ (Abduction: Child's Objections)* [2011] 1 FLR 1153 ("*WF v FJ*"), at [25], that it was "clearly preferable, where the time and resources permit, for the child to be seen by the Cafcass High Court Team before any decision is taken as to party status".

52. The submissions also drew attention to the "strengths of the appointment of a guardian from the court's perspective" and to the benefits of the tandem model as referred to by Thorpe LJ in *Mabon v Mabon* [2005] Fam 366 ("*Mabon*").

53. In respect of the provisions of the FPR 2010, it was noted that a guardian's duties depend on whether they have been appointed under r. 16.3 or r. 16.4. A question was raised as to the meaning, in PD16A, paragraph 7.6, of the guardian being required to conduct proceedings for "the benefit of the child". Did this mean in the child's best interests or in accordance with their instructions? It was also suggested in the written submissions that "it is this duality in the single role of a solicitor-guardian that creates difficulties". A number of authorities were referred to including *Re K (Replacement of Guardian ad Litem)* [2001] 1 FLR 663, *S v S (Relocation)* [2018] 1 FLR 825 and *Ciccone v Ritchie* about the difficulties which can arise in that situation. This led to the submission that "there may be an unresolved tension between what may be the solicitor-guardian's different but combined roles" as an advocate for a child and as a best interests' advocate.

54. I should also record that Reunite's submissions reflected a great deal of research which had been undertaken and included details of guidance issued in the USA (by the American Bar Association Section of Family Law, *Standards of Practice for Lawyers Representing Children in Custody Cases*, August 2003) and in Australia (by the Federal Circuit and Family Court of Australia, *Guidelines for Independent Children's Lawyers*, 2021). They also provided a review of legislation and authorities from Australia, France, New Zealand, Scotland, South Africa and the USA.

55. Reunite's submissions, in summary, highlighted the following points. They emphasised the importance of hearing the voice of a child *and* the importance of its being heard in a way which engenders the confidence of the child and of both parents. This was said to be "of particular importance given the prevalence and the extent to which the authorities show a need for the court to be mindful of parental influence, and of a parent's case being run indirectly, or directly through solicitors instructed on behalf of children and young people". If one of the parents believes that the other has brought about the representation of the child this "gets it off to a bad start".

56. Against that background, it was suggested that it was "critically important" that there was "a robust, professional, and independent assessment of a child's wishes, feelings

and views". This supported the conclusion that Cafcass would be best placed to provide evidence on these matters, including on the issue of "authenticity". This was more likely to be evidence in which the parties would have confidence and also on which the court could place more weight, than evidence from a solicitor-guardian. It was also suggested, as referred to above, that no decision should *normally* be taken to join a child as a party to proceedings under the 1980 Convention until a Cafcass officer had provided a report "to ensure that a neutral, welfare-based assessment of the child's views, and the surrounding circumstances are before the court".

57. In his oral submissions, Mr Setright supported the proposal that the general issues raised in this appeal and in *D (A Child)*, as to r.16.6(1) of the FPR 2010 and the role of a solicitor-guardian, would benefit from consideration by the Family Procedure Rules Committee ("the FPRC") and/or a committee set up by Sir Andrew McFarlane P. It was suggested that there was a clear need for guidance to be provided for the purposes of "delineating the role played by a lawyer who represents a child, in particular in Hague Convention proceedings given the urgency and issues at stake". This was because, at present, "solicitors operating as solicitor-guardians, in the absence of specific guidance as to the exercise and balancing of their roles, are placed in an invidious position in that their competing responsibilities to their client, and to the court, are currently ill-defined". The submissions also touched on the issue of training including: (i) as to the specific expertise of Cafcass officers, based on their training and experience, in contrast with that of solicitors who "may not be *generally* qualified or equipped to undertake the *expert* role undertaken by" the former; and (ii) as to the importance of those representing children being appropriately trained.

58. The submissions advanced on behalf of the ALC focused on the respective roles of a solicitor and of a guardian once a child has been joined as a party. They raised concerns that the process for the appointment of solicitor-guardians in proceedings under the 1980 Convention is "less than satisfactory" when compared with the careful statutory scheme which applies in specified proceedings. The latter scheme reflected the expertise of Children's Panel Solicitors gained through 40 years' experience of the operation of the Children Act 1989.

59. In her oral submissions, Ms Fottrell emphasised the ALC's concern at any erosion of the tandem model which, she submitted, is a key element of the current legal framework and the importance of which, in the context of public law proceedings, has been repeatedly endorsed. It was suggested, accordingly, that there was a need for caution in this area because *generally* it is to the benefit of children to be represented by a Cafcass guardian and a solicitor. This model of representation has considerable advantages such that, whenever children are the subject of proceedings, there is "a benefit to children in ensuring a uniform approach to the training and expertise of all solicitors taking on this role across the FPR".

60. The ALC analysed the provisions of the FPR 2010 and highlighted the distinct role of a child's guardian when that guardian is a Cafcass officer (r. 16.20). It was submitted that the structure of the Rules supported the conclusion that they primarily envisage the appointment of Cafcass to act as a guardian although they allow for the appointment of another person.

61. In respect of proceedings under the 1980 Convention, it was suggested that the appointment of solicitor-guardians represented a pragmatic solution which had

developed as "a compromise which has evolved to meet a gap in the Rules". It was recognised that such proceedings did not have the same welfare focus as other proceedings but it was submitted that this did not negate the need for children to be afforded the same protections so as to avoid the risk of inequity. The "clear delineation" between the roles of a child's solicitor and of a guardian was fundamental and should be maintained. In support of their overarching position reference was made to the UNCRC, *Mabon* and the *2019 Practice Note*.

62. The ALC also supported the suggestion that the proper role of a solicitor-guardian should be considered either by FPRC or by a committee specifically established by Sir Andrew McFarlane P. The "pragmatic" solution adopted by Baker J in *WF v FJ* had become the standard approach in an "unstructured", "ad hoc" manner which was unsatisfactory. No proper consideration had been given to whether this was appropriate as a longer-term approach. There was no guidance as to whether it was or was not appropriate for a solicitor-guardian to undertake with a "blurring of the lines" between their respective functions as a solicitor and as a guardian. For example, it was submitted that it had not been contemplated that a solicitor would, for example, "be charged with evaluating the authenticity of a child's objections or expressing views as to the degree of influence exerted by a parent".

63. The ALC suggested both that a solicitor does not have the training and expertise to provide an assessment of such matters (as authenticity and influence) and also that it would not be appropriate for a solicitor to go beyond conveying the child's direct instructions and/or their evidence. It was submitted that to deal with such matters would "generally be incompatible with the role of a solicitor" including because of issues of confidentiality. Ms Fottrell referred to Lord Wilson's observation in *Re LC*, at [55], about the extent of the child's involvement in proceedings once joined as a party:

> "In all probability however, the reasonable course would have been to confine T's participation in the proceedings to (i) the adduction of a witness statement by her, or of a report by her guardian, which was focussed on her account of her residence in Spain including of her state of mind at that time; (ii) her advocate's cross-examination of the mother; and (iii) her advocate's closing submissions on her behalf."

Ms Fottrell also referred to the judgment of Black LJ, as she then was, in *In re W (A Child) (Care Proceedings: Child's Representation)* [2017] 1 WLR 1027 and to the April 2022 Family Justice Council's *Guidance on Assessing Child's Competence to Instruct a Solicitor* ("*April 2022 Guidance*") both of which, she submitted provided valuable assistance.

64. Returning to an overarching theme in the ALC's submissions, it was submitted that, rather than seek to rely on a solicitor as guardian, the need for an independent and professional evaluation of a child's objections in cases under the 1980 Convention, and other relevant matters, strongly supported the conclusion that these issues should be addressed by a Cafcass officer. A solicitor it was submitted, including one pragmatically appointed as a solicitor-guardian, should confine themselves to acting as a solicitor.

Legal Framework

65. I dealt with the relevant legal framework in some detail in *D (A Child)* and I do not propose to repeat it all in this judgment.

The Family Procedure Rules 2010

66. I summarise the relevant provisions of the FPR 2010, repeating some of those set out in *D (A Child)* from [59].

67. Part 16 of the FPR 2010 deals with the representation of children. It sets out "when the court will make a child a party in family proceedings". Proceedings under the 1980 Convention are "family proceedings" (pursuant to a number of provisions, including s.75(3)(b) of the Courts Act 2003).

68. Rules 16.2 and 16.4 apply to proceedings under the 1980 Convention, because they are neither "specified proceedings" nor proceedings to which Part 14 applies. Rule 16.2(1) provides:

> "(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."

69. The FPR 2010 differentiate between the role of a guardian appointed under r. 16.3 which applies to "specified proceedings or proceedings to which Part 14 applies" and one appointed under r. 16.4 which applies to all other proceedings. Having regard to some of the concerns expressed, in particular by the ALC, I make clear that the present appeal is not concerned with the appointment of a guardian under r. 16.3. It is dealing only with the appointment of a guardian under r. 16.4 and, specifically, the appointment of a guardian for the purposes of proceedings under the 1980 Convention.

70. Rule 16.4(1) provides:

> "(1) … the court must appoint a children's guardian for a child who is the subject of the proceedings … if –
>
> (1a)…
>
> (a) the court has made the child a party in accordance with rule 16.2".

71. As referred to in *D (A Child)*, at [59]-[62], r. 16.6(1), which enables a child to conduct proceedings without a children's guardian, does not apply to proceedings under the 1980 Convention although it does apply to most other private law proceedings including proceedings under the inherent jurisdiction. As set out in *D (A Child)*, at [63]-[66], this anomaly was referred to by Baker J in *WF v FJ* and by Lord Wilson in *Re LC*.

72. Rules 16.22 to 16.28 apply to a guardian appointed under r. 16.4. Rule 16.27 provides:

> "(1) The children's guardian –

> (a) has the powers and duties set out in Practice Direction 16A; and
>
> (b) must exercise those powers and duties in accordance with Practice Direction 16A.
>
> (2) Where the children's guardian is an officer of the Service or a Welsh family proceedings officer, rule 16.20 applies to a children's guardian appointed in accordance with this Chapter as it applies to a children's guardian appointed in accordance with Chapter 6."

73. Part IV of PD 16A applies to a guardian appointed under r. 16.4. It contains a number of provisions, which I do not propose to set out in full. They first deal, in Section 1, with *when* a child should be made a party to proceedings and state, at paragraph 7.1, that this "is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minority of cases". It is also provided in paragraph 7.4(a) that "consideration should first be given to appointing an officer of the Service or Welsh family proceedings officer" as guardian for the child.

74. They then deal, in Section 2, with the duties of the child's guardian appointed under r. 16.4. Paragraph 7.6 provides that "all steps and decisions the children's guardian takes in the proceedings must be taken for the benefit of the child". It can be seen that the general duties of the guardian under this provision are limited in their express scope. However, *if* the guardian is a Cafcass Officer or a Welsh family proceedings officer then, in addition, by paragraph 7.7 they have the far more extensive duties set out under Part 3 of PD 16A. I do not propose to set these duties out but, for example, they include under paragraph 6.6, that:

> "The children's guardian must advise the court on the following matters -
>
> …
>
> (e) the options available to it in respect of the child and the suitability of each such option including what order should be made in determining the application; and
>
> (f) any other matter on which the court seeks advice or on which the children's guardian considers that the court should be informed."

The differences in the duties expressly imposed on a Cafcass Officer, when acting as a guardian under r.16.4, in contrast to any other person acting as a guardian underscore some of the submissions made in this appeal about the different expertise of Cafcass Officers and about the extent to which it is appropriate for others acting as guardians to address issues which conventionally are addressed by Cafcass Officers or other experts.

75. The case of *Ciccone v Ritchie* was referred to in the submissions made by the parties to this appeal and by the interveners. However, I do not propose to repeat the long quotation set out in *D (A Child)*, at [67]. It is sufficient to say that MacDonald J in

Ciccone v Ritchie at [72] referred to the "difficult position" in which a solicitor-guardian might find themselves "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".

76. Finally, I set out passages from Lady Hale's speech in *Re M* in which she made a number of observations about the breadth of the discretion which arises under the 1980 Convention when a child objects to returning:

> "[43] My Lords, 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"; and
>
> "[46] 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."

Conclusions

77. Before I turn to the consider the present appeal, I propose to summarise my conclusions on some of the general issues raised in this case and in *D (A Child)*.

78. First, as set out in *D (A Child*) at [57]-[58], it will only rarely be necessary for a child to be joined as a party to proceedings under the 1980 Convention. The child's voice will typically be sufficiently heard and their views sufficiently conveyed through a report by a Cafcass Officer.

79. Secondly, the issue of whether and how a child's voice is to be heard, including whether they are to be joined as a party, is dealt with at paragraphs 2.11(i) and 3.6 of the Practice Guidance on *Case Management and Mediation of International Child Abduction Proceedings*, issued by Sir Andrew McFarlane P on 1 March 2023. As set out in those

paragraphs, this issue must be considered at the first substantive directions hearing. However, as set out in *D (A Child)* at [87], this does *not* mean that a child should be joined as a party at that hearing. Rather, and repeating what I said in that case, although the issue must be considered at that hearing, "as Baker J said in *WF v FJ*, it is clearly preferable, and I would say advisable absent strong reasons to the contrary, for the child to be seen by the Cafcass High Court Team before any decision is taken as to party status".

80. Thirdly, as set out in *D (A Child)* at [70]-[74], non-expert opinion evidence is admissible. Both oral and written non-expert opinion evidence are admissible pursuant to the provisions, respectively, of s.3(2) and (3) of the Civil Evidence Act 1972 and s.1 of the Civil Evidence Act 1995. The former provides:

> "(2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.
>
> (3) In this section "relevant matter" includes an issue in the proceedings in question."

The latter provides:

> "(1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay.
>
> (2) In this Act—
>
> (a) hearsay means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and
>
> (b) references to hearsay include hearsay of whatever degree."

Section 13 of the Civil Evidence Act1995 Act provides that a "statement" means "any representation of fact or opinion, however made". Accordingly, as set out in in *Phipson on Evidence*, 20th Edition, at [29-03], this provision "covers statements of opinion admissible under the 1972 Act".

81. This issue is addressed in some detail in *Phipson*, at [33-112], as set out in *D (A Child)* at [72], which I repeat (with some footnotes incorporated):

> "[33-112] Although in general inadmissible, the opinions or beliefs of witnesses who are not experts are admissible in proof of the matters mentioned below, on grounds of necessity, more direct and positive evidence being often unobtainable. Moreover, it has long been thought, and for civil cases it has now been declared by s.3(2) of the Civil Evidence Act 1972, that non-expert opinion may be received as evidence of the facts intended to be conveyed by that expression of opinion. Thus there is no

> blanket rule that a factual witness may not include opinion evidence in his witness statement in civil cases. There are numerous authorities which exemplify that a witness of fact may give opinion evidence which relates to the factual evidence he is giving, particularly if he has relevant experience or knowledge. An example is where the evidence given is to a hypothetical situation as to what would or could have happened [*MAD Atelier International BV v Manes* [2021] EWHC 1899 (Comm) at [11]]. In *Rasool v West Midlands Passenger Transport Board* [[1974] 3 All E.R. 638] an account of a witness of a road accident was received notwithstanding the fact that it contained the words "the bus driver was in no way to blame for the accident". The court treated them as admissible although the 1972 Act did not fall to be considered, and the point was not argued [This passage in the 17th edition of Phipson was followed in *Lawrence v Kent County Council* [2012] EWCA Civ 493, which observed that time and time again one sees references to the opinions of a factual witness in judgments without any suggestion that they are totally irrelevant (at [25])].
>
> The statute purports to declare the law, and it is thought that the position must be the same in criminal cases. This proposition is given emphatic support by *R. v Johnson* [[1994] Crim. L.R. 376 CA] where a witness testified that she had seen the victim of a rape and buggery of the defendant shortly after the incident and that although she had initially thought that the victim was play-acting, she had come to believe that her distress was genuine.
>
> In civil cases, hearsay evidence of opinion is admissible under s.1 of the Civil Evidence Act 1995 (which renders all hearsay, whether of fact or opinion admissible). This provision extends to admissible non expert opinion of the kind discussed here."

I do not propose to quote again from *Lawrence v Kent County Council* [2012] EWCA Civ 493, which is set out in *D (A Child)*, at [73].

82. I next turn to the proper scope of the role of a solicitor-guardian in proceedings under the 1980 Convention.

83. During the course of the respective submissions, the lack of clear guidance on how a solicitor-guardian should perform or manage their separate roles was mentioned on a number of occasions. This applied both to the absence of guidance provided in the authorities and to absence of guidance provided by relevant bodies such as the Family Justice Council and the Law Society. The former has published its *April 2022 Guidance* while the latter has issued its *2019 Practice Note*. However, neither of these addresses the circumstances with which this appeal is concerned; the latter is expressly limited to public law proceedings.

84. It was clear from all the submissions we heard that there is a clear need for two issues to be addressed other than through a judgment from the court. This is because they

raise broader issues and require consultation and consideration which is beyond the scope of a judgment.

85. The first is the question, as referred to in *D (A Child)* at [62]-[66] and [68]-[69], of whether r.16.6(1) of the FPR 2010 should be extended to apply to proceedings under the 1980 Convention so that a child who has been made a party *can* act through a solicitor without a children's guardian being required. On reflection, as this rule already applies to proceedings under the inherent jurisdiction, this is probably a matter which can be addressed by the FPRC.

86. I would just add that, while I fully appreciate the concerns expressed, in particular by the ALC, as to the need to avoid undermining the crucial benefits provided by the tandem model, it is not easy to understand why proceedings under the 1980 Convention should be excluded when r.16.6(1) applies to proceedings under the inherent jurisdiction.

87. The second matter is undoubtedly a much broader issue which, as referred to in *D (A Child)* at [69], would benefit from being considered by a committee or as Sir Andrew McFarlane P might consider most appropriate. It is broader because it raises a number of issues on which the professions and Cafcass, as well as others, would no doubt have valuable experience and opinions to offer.

88. The issue is the proper role of a solicitor-guardian in proceedings under the 1980 Convention having regard, in particular, to their training and expertise and to the potential tension between, or the "difficult position" as referred to by MacDonald J in *Ciccone v Ritchie* resulting from, their duties as a solicitor and their duties as a guardian. This includes the extent to which it is appropriate for a solicitor-guardian to express opinions or views in their evidence beyond those necessary to explain why they consider a child competent to instruct them directly.

89. Clearly, there is also the potential for this issue to impact on other private law proceedings. This is another reason why it is suggested that this issue would benefit from being considered by a committee. In summary, the general issues which have been identified are: (a) the appropriate nature of the role of a solicitor when acting as a solicitor-guardian, in particular, in respect of the scope of the evidence they adduce; and (b) the process which should be adopted in respect of a child being joined as a party to private law proceedings. As expressed in *D (A Child)*, these are suggestions only and are not intended to be prescriptive as to the matters which might be included. It may also be that these matters are first considered only in relation to proceedings under the 1980 Convention.

90. Finally, pending any review of the proper scope of the evidence given by a solicitor-guardian, I would further repeat what I said in *D (A Child)* at the end of [67], when I agreed with MacDonald J's observations in *Ciccone* about matters which are "properly the task of a Cafcass officer". These include, in particular, the quality and strength of a child's views and objections, whether they are "authentic" and, referring again to Mr Setright's submissions, "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, and the exercise of the court's discretion".

91. Accordingly, in my view, at present solicitor-guardians should not seek to give opinion evidence beyond that necessary to explain why they consider a child competent to instruct them (under r.16.6(3)(b)(i)). I appreciate that the *April 2022 Guidance*, at paragraph 7, refers to the need for a solicitor to be "alert to the potential influence of the parent or person who has brought the child to see them, both before proceedings have been initiated, and once they have started". But that is for the specific purposes of deciding whether a child "is competent or has sufficient understanding to conduct proceedings". It is not for any wider purpose. At present, solicitor-guardians should confine their evidence to setting out the child's perspective or views as relayed through their instructions. If they seek to go further, the express permission of the court should be sought in advance so that the issue can be properly considered in the context of the individual case.

Determination

92. I propose first to deal with Ms Kirby's challenge to the judge's refusal to adjourn the hearing in particular to enable a further report to be obtained from Cafcass and to the judge's reliance on the evidence of Ms Broadley. These are, essentially, grounds 1 and 2.

93. As to the former, the issue of whether a further report from Cafcass was required had been considered at the hearing on 4 April 2023. As explained in the recital to the order made that day, the court decided that no further report was required because the father did not seek to separate the children. His position changed, or at least the other parties were informed that his position had changed, so that he sought the return of Y even if no return order was made in respect of X, the day before the hearing. There was also, at that stage, no challenge to the admissibility or relevance of Ms Broadley's evidence. In those circumstances, the judge was plainly entitled to decide that it was not necessary to adjourn the final hearing to enable further evidence to be obtained from Cafcass or for any other reason.

94. As to the judge's reliance on the evidence of Ms Broadley, no challenge was made to the admissibility of this evidence, or the relevance of it, or the weight which could properly be applied to it at any time prior to this appeal. Indeed, as King LJ pointed out during the course of the hearing, the Skeleton Argument filed on behalf of the father for the May 2023 hearing before the judge expressly referred to and relied on Ms Broadley's evidence in support of the father's case. In her oral submissions, Ms Kirby frankly accepted that she had neither addressed the issue of admissibility or the weight which might be placed on Ms Broadley's evidence. She submitted, however, that the reliance placed by the judge on this evidence had been "inappropriate" and had led her to reach conclusions which were not justified. Also, as referred to above it had been "unexpected".

95. It is clear to me that it is too late for these submissions to be made. If this evidence was to be challenged in this way, this had to be raised during the course of the proceedings below. The proceedings were conducted and determined on the basis that there was no challenge to the admissibility or relevance of this evidence and it would be wrong for this court to permit these arguments to be deployed now. These new submissions seek to change the whole course of the proceedings and hearings below.

96. I also, with all due respect to Ms Kirby's submissions, do not see how the judge's reliance on this evidence to reach the conclusions which she did could have been unexpected. The judge had already relied on Ms Broadley's evidence in her April 2023 judgment when deciding that there had been a fundamental change of circumstances. It was, in my view, inevitable that the judge might rely on this evidence to support her conclusions when determining the re-hearing.

97. In any event, for the reasons set out above, Ms Broadley's evidence, including her opinion evidence, was both admissible and relevant.

98. Accordingly, contrary to Ms Kirby's submissions, the judge was plainly entitled to reach the conclusions which she did based on this evidence balanced with the other relevant evidence. I would just add for the avoidance of doubt that the judge was not obliged to prefer the evidence of Ms Callaghan, as Ms Kirby in essence suggested. The judge had to decide, as she did, what weight to apply to all relevant evidence.

99. I also reject Ms Kirby's submission that the judge should have found that there had been "no change of factual background" between February and May 2023 (ground 3). The judge had been entitled to find, as set out in her April 2023 judgment, that there had been a fundamental change of circumstances. The father's application for permission to appeal that decision was refused and he cannot now seek to go behind that decision.

100. I would add that it is plain from the passages in the judgment quoted above that the judge carefully considered all the evidence. It was a matter for her to decide what weight to attribute to different aspects of the evidence and there is nothing to suggest that her analysis was flawed in any material respect or was wrong.

101. Equally, the judge's analysis when deciding what order to make did not omit any material consideration. As submitted by Mr Jarman, the judge had a broad discretion based on X's objections, as set out in *Re M,* when deciding whether to make a return order. There is nothing to suggest that she gave "disproportionate weight" to X's objections. The judge's detailed analysis can be seen at [64] and [67], during the course of which she expressly referred to each of matters relied on by Ms Kirby, namely the protective measures available in Mauritius, the circumstances of the children's removal from Mauritius, the policy behind the 1980 Convention and the father's relationship with Y. Matters of weight are, of course, for the trial judge and there is nothing which would support the conclusion that the judge's analysis is flawed. Indeed, it is a careful and comprehensive analysis.

102. As to ground 4, I accept Mr Jarman's submission that the judge was not required to "insist" that the mother state whether she would return to Mauritius if the court ordered Y's return, especially as this arose from the father's very late change of position. The judge carefully analysed this issue, at [69)5)], in a manner which was entirely appropriate.

103. Ground 5 is without substance. This was a very minor aspect of the judge's reasoning which is not open to challenge.

104. In summary, once the challenge to the judge's reliance on the evidence of Ms Broadley and the headteacher falls away, there is nothing of substance in the remaining grounds

of appeal. The judge plainly took all the evidence into account and equally plainly balanced the relevant factors when deciding how to exercise her discretion based on X's objections and in determining whether Article 13(b) was established and whether to make a return order, in particular in respect of Y. Her decision is carefully and fully explained and justified.

105. Accordingly, in my view, the father's appeal must be dismissed.

Lady Justice Elisabeth Laing:

106. I agree.

Lady Justice King:

107. I also agree.