Neutral Citation Number: [2021] EWFC 76

Case No: ZC20P01589

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/09/2021

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between:

A and B	**Applicant**
(Through their solicitor, James Alexander Netto)	
- and -	
F	**Respondent**
M	

- -

Re A & B (Rescission of Order: Change of Circumstances)

- -

Nicholas Goodwin QC and Dr Rob George (instructed by **International Family Law Group LLP**) for the Applicants (A and B)
The father appeared in person, unrepresented
The mother appeared in person, unrepresented

Hearing dates: 25-27 August 2021

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Approved Judgment

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THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cobb:

Introduction

1. The applications before the court are made by two young people, A, a girl aged 17y 7m and her brother B aged 12y 4m; they are both assessed as competent to litigate and make the applications by their solicitor, James Netto. The applications were initiated in the High Court under *Part 18 Family Procedure Rules 2010* ("*FPR* 2010") on 4 March 2021. At first, the Applicants sought disclosure of documents from, and party status in, existing proceedings between their parents. The Applicants subsequently made applications (issued in May and August 2021) for the following substantive relief:

    i) To "rescind" or "vary" an order made at the Central Family Court by HHJ Caroline Wright, sitting as a Deputy High Court Judge, on 23 December 2020, by which she ordered their immediate return to this country from the Kingdom of Spain; this application is made pursuant to *section 31F(6)* of the *Matrimonial and Family Proceedings Act 1984* ("*the 1984 Act*").

    ii) In the event that the order of HHJ Wright is rescinded or varied so as to remove the requirement for the children's return, for the transfer of proceedings issued in this country to the Kingdom of Spain under *Article 15* of the *Council Regulation 2201/2003* ("*BIIR*");

    iii) In the event that the order of HHJ Wright is rescinded or varied, but the transfer is refused, a welfare-based determination that they may remain living in Spain with their father.

    The Applicants had earlier sought a stay of the order of HHJ Wright, which Peel J initially granted in March 2021, and I extended in May 2021, when the matter was first listed before me.

2. Although the Applicants had initiated their application under the High Court's inherent jurisdiction seeking discovery of court documents and joinder, the essential relief sought (identified at §1(i) above) pertains to an order made in the Family Court; although the High Court has similar power to set aside its own orders (under *rule 4.1(6) FPR 2010*[1] and/or otherwise) the relief sought under *section 31F(6)* of the *1984 Act* is available only in the Family Court. Having heard submissions from the parties, I re-constituted the hearing within the Family Court, and the order made herein is made within those proceedings.

3. It would ordinarily be desirable for any application for rescission or variation under *section 31F(6)* to be re-listed before the judge who made the original order (see Peter Jackson LJ in *Re E* (citation below) at [45]), but this was not in fact proposed in this case, and given that the application had commenced in the High Court and was then listed before me, I proceeded to hear it substantively. I wish to make clear that the Applicants do not assert any error on the part of HHJ Wright and they have been clear

[1] See *N v J* [2018] 1 FLR 1409 at [69], [72] and [74] (MacDonald J)

that this is not an appeal from her decision. The application has been determined on that uncontroversial basis.

4. It was agreed at the pre-trial review that I would consider the issues in §1(i) and §1(ii) on the written and oral submissions of the parties; only if I reached the stage contemplated in §1(iii) would it be necessary for me to receive oral evidence. The hearing was conducted in a 'hybrid' form; the Applicants' mother, the Second Respondent ("the mother"), (accompanied by an interpreter) has been present in Court in London as have counsel and solicitors for the Applicants, and me. The Applicants' father, the First Respondent ("the father"), has joined by video-link from Spain. I asked at the pre-trial review whether the children wished to attend the hearing or meet with me (by video-link) in accordance with the *Guidelines for Judges Meeting Children who are subject to Family Proceedings* of 2010, but they have politely declined to take up either offer.

5. In determining issues §1(i)/(ii), I received and read detailed statements of the parties (from Mr James Netto on behalf of the Applicants); I have received translated versions of a number of documents generated in ongoing proceedings in Spain, together with a litigation chronology prepared by Mr Netto which the mother has helpfully annotated with her comments; the mother has prepared for me her own 'flowchart' of the Spanish Court proceedings. I received oral submissions from Mr Goodwin QC and Dr George on behalf of the Applicants, from the mother and father in person.

6. Following those submissions, I concluded that the order of HHJ Wright should indeed be "rescinded", and that an invitation should be extended to the Courts of Spain under *Article 15 BIIR* to assume jurisdiction. I did not need therefore to go on to consider the issue in §1(iii). I advised the parties of this decision at the conclusion of the hearing; this judgment sets out my reasons for my conclusions.

Background

7. The Applicants are the two children of the Respondent parents. The father is Belgian, and the mother is Spanish. The Applicants were born in Spain, are Spanish citizens, and are currently living in Spain with their father. A has been in Spain for over two years, and for all but three months of that period, she has been in the care of her father. B has been in Spain, with his father, since May 2020 (15 months).

8. The parents were married in 2002 and two years later A was born. In 2009, B was born. The family lived in Spain until 2010 when they all moved to live in England. In 2015, the parents separated, and the father returned to Spain; the mother has notionally remained living in London, though has property in Spain. Divorce proceedings followed in England, as did contested proceedings under the *Children Act 1989* ("*CA 1989*"). On 23 May 2017, HHJ Tolson QC, sitting at the Central Family Court, made final orders under the *CA 1989* which provided for the children to live with their mother and spend time with their father "on such occasions as are agreed between [the parents]"; at the hearing at which these orders were made the father was neither present nor represented, though it is apparent that he had proper notice, and the opportunity to advance his case. The father applied to have the order set aside; HHJ Tolson QC dismissed the application on 11 July 2017. At that later hearing the parents agreed that the children would spend four weeks in each summer holiday with the father.

9. Within a short time of that order, the children visited their father in Spain for a summer holiday. At the conclusion of the visit, the children did not return to the mother or this jurisdiction as planned. The mother issued proceedings under the *1980 Hague Convention* in Spain, and an order for their return was made in March 2018. The children finally returned to England in September 2018. Financial proceedings between the parents, consequent upon the divorce, had in the meantime concluded in this country in June 2018.

10. In 2019, the children visited Spain again for a holiday, this time initially accompanied by their mother, who was visiting the children's maternal grandmother ("MGM"). During this visit the mother and A had a serious argument; A fled to her father's home. On her return to her mother and the MGM, further disagreement followed, and A filed a complaint with the police against her mother, alleging mistreatment. The police complaint did not in fact lead to a prosecution, but A was removed from her mother's care and for three months was placed in institutional care in Spain; there is a dispute between the parties now as to whether either parent could have given permission to the other to make arrangements to care for A in the short-term. Pursuant to an order of the Valencia Court in November 2019, A was placed in the temporary care of her father, where she has remained. The order was "conditional on the girl being on the one hand schooled in Madrid in a centre that follows the British educational system" and secondly, conditional upon the father filing a "request for modification of measures" (custody). An order for 'contact' between A and her mother was further made. A was placed in school in Madrid. B remained with his mother in London. The Valencia Court had recorded the "very difficult relationship" between A and her mother; in her ruling, the Magistrate-Judge of the First Instance Court added:

> "[A], who will be 16 years old in three months, showed a radical aversion to living with her [mother] again, and although this rejection is justified in a way, it is true that the imposition by force of coexistence with the mother at a time when the confrontation with her is very acute, it could be very damaging for a young woman who has already shown her indomitable character, even betting on risky behaviours" (sic.). (Emphasis by underlining added).

11. The mother did not issue fresh proceedings in Spain under the *1980 Hague Convention*; alternatively, on 5 December 2019, she issued proceedings under the *CA 1989* in the Central Family Court in London seeking an order for A's return to this country. On 20 December 2019, HHJ Wright made an order declaring that A was habitually resident in England, and ordering A's return to her mother and to this jurisdiction; it is recorded that the father had been served with the process, but he was neither present nor represented at the hearing. The order recites that "[t]here is no Order in force following the child being released from temporary public care to provide for the child's living arrangements other than the Order dated 23 May 2017"; while it is true that there was no English order in force at that time other than the 23 May 2017 order, the Spanish Court had made a 'provisional' order placing A in her father's care as discussed at §10 above.

12. In the meantime, on 13 December 2019, the father had filed an application in a First Instance Court local to his home in Madrid for a substantive custody order in respect of A (as required of him under the 14 November 2019 order). This application was

dismissed in March 2020 (see §22(iv)(a) below) for want of compliance with proper procedure.

13. In April 2020, B and his mother visited the MGM in Spain. In the following month, B telephoned his father, and alleged that his mother had assaulted him. The police became involved, and B made a complaint; the police moved him into his father's care, where he has remained. The father issued proceedings in relation to B, seeking provisional measures. In July 2020 (see §22(iii) below), the Appeal Court in Valencia ordered the return of A to the mother and to England; in further rulings later that month, the Spanish Court ruled that B should be in the care of the mother. In October 2020, the children were seen by a judicial examiner who reported that they wished to remain living in Spain; the father's renewed application for provisional measures to educate B in Spain for the academic year 2020/21 was therefore granted and he was granted provisional custody of B; in November 2020, the father was given a 'provisional' order to arrange for A's schooling in Spain for the 2020/2021 academic year.

14. On 16 December 2020, the mother issued a further application (for a specific issue order under *section 8* of the *CA 1989*) in the Central Family Court seeking once again the return of A and B from Spain to this jurisdiction; she applied initially without notice to the father. The court rightly required the mother to give notice to the father and re-listed the case for hearing on 23 December 2020. The mother's application came before HHJ Wright on 23 December 2020; I discuss her order and judgment in the next section.

15. To complete the picture, in February 2021, the father's appeal against the dismissal of his custody application concerning A was allowed (see §22(iv)(a) below). This has now paved the way for this application to be pursued in Spain. The application has been formally issued in his local court; the mother has lodged her response. The proceedings concerning B are also before the same court (see further §22(iv)(b) below re: Spanish Proceedings).

The decision of HHJ Wright

16. The mother's application for a specific issue/return order was considered before HHJ Wright at a directions hearing, on short notice to the father, on 23 December 2020. No evidence had been filed. The Judge heard the mother as a litigant in person; the father was represented by counsel. Following submissions the Judge gave a judgment, in which she made the following key findings:

    i) That the children had been unlawfully retained by the father in Spain, and that the "unlawful retention continues";

    ii) That the children were habitually resident in England and Wales; specifically

> "… neither child has established a habitual residence in Spain; [A] was not properly educated, she has not integrated in Spain, she was attending school in London where she continues to live pursuant to Orders made in both this and the Spanish jurisdiction; [B] has not been educated, he has not integrated in Spain, both children have been unlawfully

> retained and neither has established a habitual residence in Spain";

iii) The Spanish Court appears to have confirmed the obligation on the father to return A and B from Spain and into the care of their mother;

iv) That given the exceptional circumstances of the case, it was appropriate to make an order in relation to A even though she was nearly 17 years old;

v) The children should be returned from Spain to England forthwith and in any event by 28 December 2020;

vi) That the order of 23 May 2017 remains in force;

vii) That permission to appeal be refused.

17. Given the nature of the listed hearing, and its time estimate, it is unsurprising that HHJ Wright did not have every aspect of the factual background entirely clear. For instance,

i) She referred to the fact that "[i]n August 2019, whilst [A] was in Spain having contact with her father, she was taken into State care in Spain"; in fact, A was 'taken into State care in Spain' from the care of her *mother*, against whom she had made a serious complaint to the Spanish police alleging ill-treatment;

ii) "The Court in Spain found that none of the allegations made either by [A] or by her father against the mother or about her care were made out"; these allegations have never in fact been subjected to any form of fact-finding or other adjudication in Spain;

iii) She described how "[B] also went to stay with his father" in May 2020, and that "[t]he father then refused to return [B] to his mother's care", perhaps not appreciating that B was placed with his father by the police following B's allegation of ill-treatment at the hands of his mother;

iv) She found that "[B] has not been in school in Spain"; the evidence in fact indicates that B has been in school in Spain since soon after his arrival;

v) The Judge says that she was "unable to read the judgment and order" of the Spanish Court 13 October 2020, and was critical of the father and his legal team for not assisting her with a clear understanding of the order ("I am satisfied either of them would be able to assist the court, had they wished to do so"). It is unclear why there was a difficulty over the interpretation of the order. As it happens, the order was favourable to the father in that it reflected (following a 'judicial interview' with the children) that the children were expressing their opposition to returning to this country and to the care of the mother, and the Spanish court refused to make orders returning them. Indeed, by order of 13 October B was placed in the care of the father under an interim custody order while the Spanish courts investigated the merits of custody . An order requiring the father to return B to the care of the mother was dismissed on that occasion. It may be said that this would indeed have been helpful to HHJ Wright in her evaluation;

vi) It appears that HHJ Wright was also not aware of the contents of the mother's e-mail to the Spanish Court (29.9.20) – which is embedded in the order of the Spanish Court of 26 November 2020, and which I have reproduced at §51 below.

18. The Judge recorded the fact that the father had raised in argument at the hearing the need for the court to take into account the children's wishes and feelings "particularly given their ages". There is nothing in the analysis or findings section of the judgment which reflected how the judge had evaluated, and/or taken account of, the children's views; this has inevitably made more difficult my assessment of whether there has been a material change of circumstances since her decision.

19. The father lodged an appeal against this order on the following day, Christmas Eve 2020. He contended, *inter alia*, that the judge had been wrong to make a finding of habitual residence in the absence of evidence on the issue. A stay of the order was granted by Newey LJ. The application for permission to appeal was considered by Moylan LJ on 29 January 2021. He refused permission to appeal. I am not aware that the mother took any active steps to enforce the order prior to the Applicants issuing their own applications.

20. As I have indicated, I am conscious that the applications currently before the court are not, nor should they be treated as, an appeal against HHJ Wright's order.

Spanish Court proceedings

21. As earlier mentioned, the mother initiated proceedings under the *1980 Hague Convention* in Spain in 2017 to secure the summary return of the children. By a court ruling in Madrid on 22 March 2018 the retention of the children by their father was declared to be wrongful and in breach of the mother's rights of custody; within those proceedings, a summary order for the children's return was made.

22. Domestic welfare proceedings concerning A were commenced in Spain in late-2019, under case number 1177/2019, while she was still resident in state care. Domestic welfare proceedings concerning B commenced in Spain in the following year, under case number 333/2020. Confusingly, proceedings concerning both children have been conducted in two court centres (in Valencia and separately in a court near the father's home in Madrid), and the litigation history is further complicated by the fact that 'provisional measures' have been sought and granted, and 'definitive measures' have also been sought; there have been numerous appeals. It is not necessary for me to rehearse the details of the Spanish litigation in this judgment at length; it is, I believe, sufficient for me to record the key information which, following reasonably thorough examination during the hearing, I have extracted from the documents and submissions:

i) At no time has the Spanish Court made a substantive / definitive order granting 'custody' of either A or B to the father in either set of proceedings; this much is agreed by all parties;

ii) The Spanish Court has made a number of 'provisional measures' orders (i.e., temporary orders), including (at times) the grant of conditional custody of both children to the father (see above);

iii) On 23 July 2020 the Spanish Appeal Court affirmed the English Court's order to return A to the mother (and to this jurisdiction);

iv) The father has current applications for 'custody' of A and B before the courts in Spain:

a) The father's application for full custody ('definitive measures') of A (1177/2019) was initially dismissed (in March 2020) for want of procedural compliance; earlier this year (19 February 2021), the father's appeal against that dismissal was allowed (when he was able to prove compliance) and directions have now been given for the application to proceed (the order provides: "Once the proceedings are received in the Court of origin, proceed to the admission for processing of the claim, with everything else that may take place in accordance with the law"). On 2 July 2021, the mother, by her lawyer, filed a detailed response to the application in those proceedings, challenging the jurisdiction of the Spanish Court, proposing a stay of those proceedings pending this adjudication, and challenging the order on its merits;

b) The father's application for custody ("modification of non-consensual definitive measures") of B (333/2020) has been "admitted for processing". A 'Decree' (the equivalent of a 'Directions' order) was made on 5 May 2021. It appears that the next step is for the mother to file an answer in those proceedings, within 20 days of the appointment for her of a state-appointed lawyer. The mother told me that she is still awaiting the appointment of a state lawyer (she had written to the state Bar Association on 21 May 2021 requesting the appointment of a lawyer). The mother initially told me in her submissions that when she does file an answer, she will be asserting that the Spanish Court has no jurisdiction to determine the issue of custody of B. She later told me that she plans to play no part in the Spanish proceedings at all.

23. The mother has a very good grasp of the Spanish court process, and has fully engaged in proceedings there. She argued before me that the father has failed to comply with the conditions of various provisional orders which render them void, or of no current legitimacy; she further asserts that the provisional measures granting the father power to arrange the children's education for the academic year 2020/21 have now expired, and that he would need to obtain further orders in similar terms for the next academic year. Doubtless these are points which she has raised or will raise in the Spanish Court.

24. It is notable that the Spanish Courts have been respectful of the English Court orders; the Spanish Judges have (thus far) only made *provisional* orders to secure the children's *interim* welfare.

Rescission or Variation of Family Court order: the legal context

25. The principal relief sought by the Applicants – either rescission or variation of an earlier Family Court order[2] – is available to them under *section 31F(6)* of the *1984 Act*. *Section*

[2] But note what I say at §39 below

31F(6) sits within *Part 4A* of the *1984 Act* which, in 2014[3], brought into being the Family Court.

26. *Section 31F(6)* provides as follows:

> "The family court has power to vary, suspend, rescind or revive any order made by it, including—
>
> (a) power to rescind an order and re-list the application on which it was made,
>
> (b) power to replace an order which for any reason appears to be invalid by another which the court has power to make, and
>
> (c) power to vary an order with effect from when it was originally made.".

27. As I say, the Applicants seek the *rescission* of the order of 23 December 2020 under *section 31F(6)(a)*, alternatively its *variation* under *section 31F(6)(c)*. That the statutory power exists is uncontroversial, as illustrated by Lord Wilson's comments in *Gohil v Gohil* [2016] 1 All ER 685 at [18](c):

> "It seems highly convenient that an application to set aside a financial order of the family court on the ground of non-disclosure should, again, be made to that court and indeed at the level at which the order was made; and this convenient solution seems already to have been achieved by the provision of the *Matrimonial and Family Proceedings Act 1984* recently inserted as *s 31F(6)*, under which the family court has power to rescind any order made by it."

28. The more challenging question is *how* the section should be applied. There is nothing in *section 31F(6)* which suggests any limit as to how the court's power may be exercised, but it is clear from authority that the court's power under the section is not "unbounded": per Baroness Hale in *Sharland v Sharland* [2015] UKSC 60[4] at [41]; it should be subject to "principled curtailment" (per Rix LJ at [39](i) in *Tibbles* – citation see below).

29. Mostyn J provided a detailed analysis of the history of *section 31F(6)* in the context of a financial remedies claim in *CB v EB* [2020] EWFC 35, [2020] 2 FLR 575 and this repays review. In his judgment, he discussed what he termed "the traditional grounds" on which a decision could be challenged in the trial court; in this, he borrowed from an earlier decision of Munby J (as he then was) in *L v L* [2008] 1 FLR 26 at [34]:

> "The situations which may trigger such a review are:

[3] *Crime and Courts Act 2013*
[4] Borrowing from Munby P in *CS v ACS* [2015] EWHC 1005 (Fam),

> i) if there has been fraud or mistake: *de Lasala v. de Lasala* [1980] AC 546;
>
> ii) if there has been material non-disclosure: *Livesey (formerly Jenkins) v. Jenkins* [1985] AC 424;
>
> iii) if there has been a new event since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made: *Barder v Caluori* [1988] AC 20, [1987] 2 FLR 480;
>
> iv) if and insofar as the order contains undertakings: *Mid Suffolk District Council v Clarke* [2006] EWCA Civ 71, [2006] All ER(D) 190 (Feb);
>
> v) if the terms of the order remain executory: *Thwaite v. Thwaite* [1982] Fam 1, (1981) 2 FLR 280 and *Potter v Potter* [1990] 2 FLR 27."

30. Having considered the legislative history, Mostyn J. concluded:

> "55. My historical excursus above demonstrates that the set aside power in *section 31F(6)* was not a brand new break with the past. It did not usher in a brave new world. It was no more than a banal replication of a power vested in the divorce county courts from the moment of their creation in 1968. That power had been confined by the law to the traditional grounds for decades. Interpreting *section 31F(6)* purposively and with regard to its historical antecedents leads me to conclude clearly that in the field of financial remedies its lawful scope, or reach, starts and ends with the traditional grounds. …
>
> 57. … There is no lawful scope for imaginative judges to unearth yet further set aside grounds. The available grounds are the traditional grounds, no more, no less". (Emphasis by underlining added).

31. In *N v J* [2018] 1 FLR 1409 MacDonald J looked at the circumstances in which a Judge of the High Court, Family Division, could reconsider (set aside or rescind) a previous decision of made under the inherent jurisdiction; the suggested mechanism for achieving the proposed rescission in that situation was the power vested in the court under *rule 4.1(6) FPR 2010*. Importantly, he was not considering the rescission of an order in the Family Court jurisdiction as I am here. I do not need to enter the debate over whether *rule 4.1(6) FPR 2010* can truly apply to final orders; Mostyn J thought not, "given that by its literal terms it only applied to orders made pursuant to a power contained in the rules themselves" (*CB v EB* at [31]), a view shared elsewhere. However, for the purposes of this judgment, Mostyn J usefully added, at [37]:

> "… the framers of *section 31F(6)* were seeking to vest in the new Family Court an equivalent rehearing power to that which had been deployed by the divorce county courts it was replacing. It is equally clear to me that the framers were not content to leave the power to set aside a final financial remedy order (or for that matter any other final order) in the hands of *FPR rule 4.1(6)*, given the controversy as to its scope even by then surrounding it."

32. MacDonald J considered (at [2018] 1 FLR 1409 [75]) that *rule 4.1(6)* of the *FPR 2010* gave him the power to rescind or set aside a substantive 'return' order made under the Court's inherent jurisdiction, observing that:

> [72] "It would be truly remarkable if the High Court had a common law jurisdiction to review an order relating to money where no error of the court is alleged but did not have such a jurisdiction with respect to orders governing the welfare of children".

His rationale for considering he could properly review a 'return' order made under this power was that:

> [74](i) "… a return order made under the inherent jurisdiction is properly characterised as injunctive and interlocutory in character, in that it seeks to compel a parent to return the child to the jurisdiction of his or her habitual residence pending final trial of the substantive welfare issues before the court".

33. The reason why consideration of *N v J* is useful for present purposes is that at [78] MacDonald J summarised the basis for intervention thus:

> "… the applicant must be able to demonstrate a change of circumstances, or material non-disclosure, relevant to the evaluation of the welfare of the subject child such as to justify the setting aside of the order as being in the child's best interests".

34. Under the equivalent civil procedure rule (namely *CPR r.3.1(7)*), the Court of Appeal in *Tibbles v SIG plc (t/a Asphaltic Roofing Supplies)* [2012] EWCA Civ 518, [2012] 1 WLR 2591 identified the circumstances in which the discretion would be exercised:

i) where there has been a material change of circumstances since the order was made ([39(ii)]), or

ii) where the facts on which the original decision was made were (innocently or otherwise) misstated ([39(ii)]); this would include a situation where there has been material non-disclosure (per Patten J (as he then was) in *Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen* [2003] EWHC 1740 (Ch), [2003] All ER (D) 258 (Jul) and Patten LJ in *Arif v Zar* [2012] EWCA Civ 986): (see [28] of *Tibbles*).

But those considerations must be tempered by the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal (see [39(i)]).

35. Having taken *CB v EB* (a financial remedy claim) as the starting point, and having cross-referred to the similar review provisions under the *FPR 2010* and the *CPR 1998*, I must now consider whether family cases concerning the welfare of children fall into a special category in which the power to review can be more firmly welfare driven. I was not referred to, but the arguments brought to mind, the comments of Black LJ (as she then was) in *Re H A Child) (International Abduction: Asylum and Welfare)* [2016] EWCA Civ 988, at [14]:

> "Once the return order in relation to A is seen as a product of the court's normal welfare jurisdiction in wardship, it seems to me that it should be evident that if the child's welfare so required, the court could revisit it. The idea that it would not be able to do so at all (because only the Court of Appeal could handle the matter), or not be able to do so unless strict criteria for setting aside an order were satisfied, runs counter to the purpose of wardship, which is designed to respond flexibly to the best interests of the child at any given time" (Emphasis by underlining added).

36. It appears that Peter Jackson L.J. formed a broadly similar view in *Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447, [2020] 2 All ER 539. Having considered the power to review its decision (viz:

> "… the family court has the statutory power to review its own decisions and that challenges to findings of fact on the basis of further evidence do not have to be by way of appeal only" ([45])),

he then turned to the approach the court should take on such an application. In this regard, he highlighted that "the family court will give particular weight to the importance of getting it right for the sake of the child" ([47]).

37. Although this was an appeal against a finding of fact case, Peter Jackson LJ at [50] made these points which are of relevance to this case:

> "A court faced with an application to reopen a previous finding of fact should approach matters in this way:
>
> (1) It should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other.
>
> (2) It should weigh up all relevant matters. These will include: the need to put scarce resources to good use; the effect of delay on the child; the importance of establishing the truth; the nature and significance of the

> findings themselves; and the quality and relevance 0of the further evidence.
>
> (3) "Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial." There must be solid grounds for believing that the earlier findings require revisiting."

38. Thus, although Mostyn J. (see §29 above) clearly envisaged only a limited or narrow scope for *section 31F(6)*, his analysis was focused on financial remedy cases. Given the observations made by Black LJ and Peter Jackson LJ above, in which they emphasise the need, in children's cases, to 'respond flexibly to the best interests of the child' and '[get] it right for the sake of the child', Mr Goodwin queries whether the limited or narrow approach is suitable, particularly given that there is no such limitation apparent in the statute itself or in any guidance applicable to this type of case. He suggests that the only reliable guide to review (rescission, suspension, or variation) in children's cases should be welfare: he develops this by saying that if there are *prima facie* welfare grounds for an earlier order to be revisited under *s.31F(6)* it would be antithetical to a child's welfare interests if the statute precluded a re-evaluation. For my part, I consider that this goes marginally too far.

39. *Section 31F(6)* of the *1984 Act* is most likely to be deployed in a children's case where the relief sought is *rescission* of an earlier order (as here). The Family Court has wide powers under the *CA 1989*[5] to *vary* or indeed *discharge* its own order where it can be demonstrated that the circumstances have changed[6], and the interests of the child require *variation* or *discharge* of the court-ordered arrangements. In determining an application for variation or discharge under the *CA 1989*, the child's welfare will unquestionably be paramount; this may influence the jurisdictional route which the applicant chooses to take. Having considered the arguments and the caselaw above, it seems to me that the principles by which the court will determine whether to exercise it's power to rescind (or, where applicable, vary, suspend or revive) an earlier order under *section 31F(6)* of the *1984 Act* are as follows:

    i) Litigants should not be permitted to have 'two bites at the cherry' by applying again before the same court in relation to the same matter; there is an important public policy in achieving finality of litigation;

    ii) It is equally important for the court not to subvert the role of the Court of Appeal; if the litigants assert that the trial judge was wrong, the route for them to follow is an appellate one;

    iii) The first point of reference should be whether one of the 'traditional grounds' for proposed review has been established:

        a) Fraud, mistake, innocent (or otherwise) misstatement of the facts on which the original decision was made;

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[5] See for instance *section 8(2)* and *section 10(4)/(6)/(8) CA 1989*

[6] Where the applicant's complaint is (a) fraud/mistake (b) material non-disclosure (c) where the order contained undertakings or (d) where the terms remained executory, the proper (and indeed only) route is *section 31F(6)*.

b) Material non-disclosure;

c) A new event or material change of circumstances which invalidates the basis, or fundamental assumption, upon which the order was made;

d) If the order contains undertakings;

e) If the terms of the order remain executory.

iv) Where an application is made under *section 31F(6)* in relation to an order concerning children's welfare, it is permissible, it seems to me, for the court to:

a) approach the assessment of the 'traditional grounds' for review (listed in §(iii)) above, and

b) make its determination,

with appropriate flexibility[7], and with consideration to what is likely to be in the best interests of the child (i.e., it is important to "get it right for" the child: §36 above);

v) *Section 1(1)(a)* of the *CA 1989* is not engaged;

vi) Where *section 31F(6)* is deployed in order to re-open a previous fact-finding exercise, the three-fold test set out by Peter Jackson LJ in *Re E* (§37 above) should be followed.

§1(i): Should there be a rescission of the return order?

The Applicants' case

40. The Applicants' case is that there has been a material change of circumstances since the order of HHJ Wright. In this regard, they specifically assert:

i) That while it was known by HHJ Wright that the children were resistant to returning to England, these views have hardened since December 2020, and this amounts in itself to a material 'change of circumstances';

ii) That given A's age now (17y 7m), it would be unconscionable to uphold the order for her return to this country. This gives rise to the real possibility of a separation of the siblings – not a factor which appeared to be relevant to, or considered by, HHJ Wright in December 2020.

41. Mr Goodwin invites me to view these changes of circumstance against the wider welfare background – that both children wish the litigation to come to an end; that refusing their application is not likely to enhance their relationship with their mother, rather the reverse; and that the children are settled in Spain.

1. Children's views

[7] See §35 above

42. The children's current views are articulated in the written evidence (i.e., in two witness statements) of Mr James Netto. Mr Netto is a solicitor and partner at his law firm; his practice is based almost exclusively in international children law. He is Resolution-accredited in the areas of EU/international law, as well as in the area of child abduction. He is a member of the Lord Chancellor's International Child Abduction Panel on behalf of ICACU and is frequently instructed in Hague and non-Hague abduction matters. He is well known to this court as having extensive experience of representing both adults and children in abduction and relocation matters.

43. First in relation to A, he says this:

> "I have spoken in some detail with [A] about what she wishes. She provided me with exceptionally clear instructions that she cannot fathom the idea of returning to England. She told me, in great detail, how she struggles to find common ground with her mother, and that she absolutely does not want to return to England. She cannot understand how a judge in England has made an order of this nature, notwithstanding her very real lived experience. Moreover, [A] went as far as to state that <u>she will not return to England</u>. She told me that she gets on exceptionally well with her brother and he is most certainly of the same mindset that he does not wish to return. She confided that she was trying to protect her brother from too much conflict";
>
> "… she "could not imagine" going back to London and living with her mother. "I am an adult. I have thought about it, and I know what I want"". (Emphasis by underlining added).

And then in relation to B:

> "I then asked how [B] had ended up with his father in Madrid. [B] said: "I was in Valencia and my mum was being really horrible… aggressive and bullying me. She hit and scratched me, and was shouting. It was really bad. We argued so much and I had enough. I called my dad and the next day – well, I am not sure what exactly happened but he knew I was in Valencia and I called him. It was quite scary, but now I am so happy. I am much happier than ever".
>
> Later, "I then suggested that the court could require him to return to England, and for his sister to remain in Spain. For the first time in our conversation, I noted a real sense of him being upset. He became emotional, repeating: "No, no, they won't do that, would they? I would miss her so much. We tease each other, that's part of it, but I would miss her more than my dogs and dad put together! What's the point of having a sister if you can't hang out with them? We want to live together until we are adults"…He went on: "but what? Why? Why would a judge do that? It brings such sad thoughts… And without [A]? No. No. No.". I noted how

> [B]'s instant reaction was to refer first to missing his sister, as opposed to his father, when confronted with the prospect of returning to England".

The children spoke to Mr Netto quite widely about many aspects of their upbringing. The validity of their views on the prospect of return was enhanced in my judgement by the fact that their views contained balance: they spoke positively of aspects of their mother, and were not uncritical of their father.

44. The father confirms that these views are authentically the children's own. He supports the hardening of their views by reference to an incident which occurred in February 2021 at B's school in which (he says) the mother arrived unexpectedly and assaulted him in front of B. I have not investigated this issue, and nor has the court in Spain, but I understand that a complaint was filed with the police, witness statements have been taken and a trial is awaited. If there is any validity in the allegation of assault by the mother on the father, I accept that it would only be likely to have intensified the children's resistance to returning to England and/or the care of their mother.

45. I turn below (§69) to consider whether the articulation of these strongly held views can, in this case, be said to represent a 'change of circumstance' since December 2020. It is important to note that these views are potentially relevant not only to the issue of whether the return order should be upheld, but also, fundamentally, whether in fact the court could or should retain jurisdiction at all (founded on the children's habitual residence) in relation to their welfare. This latter point was considered by the Supreme Court in *Re LC* [2014] UKSC 1 in which Lord Wilson said, at [37]:

> "Where a child of any age goes lawfully to reside with a parent in a state in which that parent is habitually resident, it will no doubt be highly unusual for that child not to acquire habitual residence there too. The same may be said of a situation in which, perhaps after living with a member of the wider family, a child goes to reside there with both parents. But in highly unusual cases there must be room for a different conclusion; and the requirement of some integration creates room for it perfectly. No different conclusion will be reached in the case of a young child. But, where the child is older, in particular one who is an adolescent or who should be treated as an adolescent because she (or he) has the maturity of an adolescent, and perhaps also where (to take the facts of this case) the older child's residence with the parent proves to be of short duration, the inquiry into her integration in the new environment must encompass more than the surface features of her life there. I see no justification for a refusal even to consider evidence of her own state of mind during the period of her residence there. Her mind may – possibly – have been in a state of rebellious turmoil about the home chosen for her which would be inconsistent with any significant degree of integration on her part. In the debate in this court about the occasional relevance of this dimension, references have been made to the "wishes" "views" "intentions" and "decisions" of the child. But, in my opinion, none of those words is apt.

> What can occasionally be relevant to whether an older child shares her parent's habitual residence is her *state of mind* during the period of her residence with that parent".

46. Can the hardening of the views of subject children post-hearing represent a change of circumstances such as to justify the deployment of *section 31F(6)*? The short answer is, in my judgement, yes; and particularly so where the more recently expressed views not only materially challenge the earlier ordered outcome, but also strike (as may be the case here) at the very foundation of the Family Court's jurisdiction to make the order at all.

47. At my invitation, Mr Goodwin addressed me on a line of cases decided under the *1980 Hague Convention* jurisdiction, where courts had made return orders only for those orders subsequently to be set aside when the strength of feeling of the subject child(ren) was truly appreciated and/or displayed. In this regard, I was taken to *Re M (A minor)(Child Abduction)* [1994] 1 FLR 390. In this case an 11-year-old child, pursuant to a return order (made by consent), actually boarded a flight to Australia but created so violent a scene on the plane that he was physically removed from the flight. The matter was then placed before the Court of Appeal, who accepted that the vivid acting out of the child's views represented such a material change of circumstances since the consent order that the return order should be set aside.

48. Next, I was taken to the appellate court decision of *Re HB (Abduction: Children's Objections*) [1998] 1 FLR 422 In this case, following a hearing before Hale J (as she then was) one of the subject children, a 12-year-old girl, refused to board the plane to Denmark following the making of a return order; as it happens, her older brother had returned. Unusually, many months passed before the mother sought to enforce the order. The issue was presented to the Court of Appeal almost one year after the original order; it was argued on behalf of the child that her determined refusal to board the plane and her subsequently expressed vehement opposition to return to her mother "constitute such significant changes as to compel a finding that [the child's] objections are sufficient to justify refusing the mother's application under Art 13 of the Hague Convention on the Civil Aspects of International Child Abduction". Butler Sloss LJ agreed that the child's objections justified setting aside the earlier order, with a direction for a re-hearing. She said:

> "[The child] is of an age which makes it impossible for the Court of Appeal, in her present frame of mind, to make a decision which would lead to an attempt by the mother to take her back to Denmark by car. Such an attempt would be traumatic for the mother, daughter, and her small brother. I believe that this court cannot now shut its eyes to the relevance of the objections of a child with sufficient maturity at which it is appropriate for the court to take account of her views".

On the re-hearing, Hale J refused the return order.

49. There then followed the case of *Re P (Abduction: Minor's Views)* [1998] 2 FLR 825. This concerned a 13-year-old child who was the subject of a return order; following the

order, he went missing, and was the subject of a 'search and find' order. Butler Sloss LJ observed at 833:

> "If the boy now believes what he is saying, whether it is factually correct or not, I am extremely worried about his emotional state and the consequences for him, his reaction to his father and what would happen if he was just shipped back home. It might work, and as the father has said it would tell him the difference between right and wrong and how to obey court orders. But that is a serious gamble to take with a child of 13, just into his adolescence, and, if wrong, could be disastrous".

50. Mr Goodwin submitted that these cases demonstrate well not only how the English Court has been prepared to give proper weight to the strongly held views of competent children over the strong policy imperative which underlines the Convention (such policy imperatives do not in fact apply to these children, A and B), but also how the English Court has been prepared to flex to the changing complexion of a case when the stance taken by the subject child(ren) after the decision appears to defy the court ordered outcome.

51. The reality of the challenge of actually forcing A and B to return to the mother appeared, momentarily, to have been accepted by her. Mr Goodwin took me to the contents of an e-mail which the mother had sent the Spanish Judge on 29 September 2020, following a court hearing. Its contents repay reciting in full:

> "I would like my words and my will to be noted in the order ... the reaction of my children upon leaving the court has been very revealing ... I have decided that we cannot tighten the rope any more ..... with this I do not renounce or abandon my two children …… I do not renounce my rights but to exercise them for the sake of the minors… I prefer to wait for them to mature and come alone …… I do not wish to make them unhappy or subject them to further investigations or trials to reach the same conclusion …… I give in to the current desire of my children …… I do not ask for visits, I will wait for them to ask to come and see me when they are ready …… I can confront my ex-husband but not to my children before the Courts …… I can stand to my ex-husband but not to my children before the Courts …… I hope that my will be taken it into account.".

52. Mr Goodwin submitted that this e-mail represented a significant but rare display of realism on the part of the mother, and he encouraged her even at this late stage to reconnect with the sensitivity and insight which is contained within this message.

2. Sibling relationship: the impact of separation

53. Mr Goodwin submits that A is now realistically too old to have an order which is contrary to her wishes enforced against her; she will turn 18 years old in less than 5 months time. Accordingly, the prospect of sibling separation looms very large if the

order of HHJ Wright is not rescinded. Mr Goodwin submits that this was not in the contemplation of HHJ Wright in December 2020.

54. The primary proposition here is founded upon the statutory decree that it is exceptional to make a *section 8* order against a child over the age of 16, a point which was explicitly in HHJ Wright's mind. In this regard he draws my attention specifically to *section 9(6)* of the *CA 1989*:

> "No court shall make a *section 8* order which is to have effect for a period which will end after the child has reached the age of 16 unless it is satisfied that the circumstances of the case are exceptional."

To this, Mr Goodwin referenced an important judgment of *Re C (Older Children: Relocation)* [2015] EWCA Civ 1298, [2016] 2 FLR 1159 – a case which concerned teenage boys (16 and 14 at the time of the judgment under appeal). In the leading judgment, Peter Jackson J (sitting then as an additional judge of the Court of Appeal) referenced (at [2]) the:

> "… caution that should be felt by any court seeking to make arrangements for children of this age. In the first place, it is likely to be inappropriate and even futile to make orders that conflict with the wishes of an older child. As was memorably said in *Hewer v Bryant* [1970] 1 QB 357 in a passage approved in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112:
>
> > "… the legal right of a parent to the custody of a child ends at the eighteenth birthday and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice."
>
> … With an older child, the court's grasp cannot exceed its reach, any more than a parent's can, and attempts to regulate something that is beyond effective regulation can only create a forum for disagreement and distract the family from solving its own problems."

55. I note that Peter Jackson J returned to this theme at [62], asserting that "the general intention of the *Act* (prominently seen in *section 9*) is to prevent the imposition of inappropriate requirements on older children." He linked this to the 'no order' principle in *section 1(5)*, and added at [63]:

> "The simple fact is that E[8] is too old to be directed by the court in a matter of this kind. Although the existing child arrangements order, buttressed by the effect of *section 13* is not addressed to him, it directly affects him as the subject of

[8] At 16y 8m at the time of the order under appeal.

> the proceedings. This is not to ignore the common interests of this strong pair of brothers, but to recognise the proper limits on the court's exercise of its powers in the case of a mature and intelligent older child who is now 17 years of age".

56. Realistically, submits Mr Goodwin, this case has – in a way not contemplated by HHJ Wright – turned into a case about the return of B to England *without his sister, A.* I have already referenced at §43 above how A spoke to Mr Netto endearingly about her relationship with her brother; she later described them as "inseparable", adding "[m]ore than anything, I do not want to be separated from [B]. I'm not letting him go". Mr Netto commented: "She said this last sentence particularly firmly, with a slight quiver in her voice".

57. Mr Netto, who has spent some time with both A and B, presented his own assessment of the sibling relationship in his second witness statement thus:

> "Both [A] and [B] are incredibly close. I had the sense that they were inseparable. [A] seemingly takes on a very protective role over the brother, and [B] was more worried about being separated from her than from anyone else. [A] spoke about a feeling of "emptiness" at home without her brother. When discussing the issue of separation, both [A] and [B] were at their most emotional".

58. This assessment is supported by the father who described them thus:

> "Both children have an extremely tight brother-sister bond and rely on each other. It would be very harmful for them to be separated. [B] looks up to his big sister and adores her, [A] has taken on her role of big sister to [B] in an admirable way and wakes (sic.) over him as an older sibling usually does. They really are two peas in a pod".

59. The mother disagreed with all of these analyses:

> "[A] should not play the role of protecting her brother. She is not his mother. This occurs due to the maternal absence in their lives over the past several months. This must stop. On a psychological perspective, the overprotective attitude of [A] towards her brother can harm her emotional development and in the face of her future romantic relationships. And in the same way it may happen with [B], developing a possible emotional dependence of a mother figure in his future sentimental relationships. Both children have their mother and both need support and nurturing from me and in the right measure. In the view of the age of my children I do not see any drama in separating them. [A] should go hopefully soon to University and this fact simply separates her from her brother".

60. The courts have long recognised the importance of sibling relationships, and my firm view is that the core principle of the *Convention on the Rights of the Child 1989*, United Nations General Assembly, Resolution: 64/142, para 17 in this regard is generally applied in the English family courts:

> "Siblings with existing bonds should in principle not be separated by placement in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child".

61. In the context of the domestic caselaw, I have in mind Ryder LJ's comments in *Re K (Children)* [2014] EWCA Civ 1195, [2015] 1 FLR 95, in an appeal against a first-instance decision which would have the effect of separating siblings:

> "I need not do more than state the obvious in a case of this nature. As young people who have experienced family courts, public care and relationship breakdown make very clear in, for example, the proceedings of the Young Peoples Board of the Family Justice Board, the separation of siblings can be one of the most traumatic elements of their experience, particularly where no provision is made for the sibling relationship to be maintained so as to safeguard their long-term welfare into adulthood. Generalisations are dangerous, the intensity of sibling relationships can be very different, and this court has not been taken to any of the research studies that consider this issue. However, it is sufficient to say that a sibling relationship is central to both the article 8 respect for family life which is engaged in a decision to make a public law order such as an interim care order and welfare, which by section 1 CA 1989 is the court's paramount consideration when it 'determines any question with respect to the upbringing of a child'. It will be a relevant factor in all or nearly all of the section 1(3) factors to which the court is required to have regard." (Emphasis by underlining added).

62. HHJ Wright did not consider the issue of sibling separation at all.

The Respondents' cases

The mother

63. The mother maintains that the children's views are strongly influenced by the father who has waged a campaign of alienation against her[9]. She is firmly of the view that the children's views are not authentically their own; further or alternatively, they have been materially affected by the fact that they have not actually seen their mother now for many months; she told me that if she were able to resume contact with them ("to relax them and give them the answers they need"), the children would soon change their views. She accepted that the children had "bad memories" of London but that this was essentially attributable to the father who had failed to maintain her, and them,

[9] She relies in part on a January 2018 report prepared in Spain in this respect.

adequately when they were last here; she accepted that when they were last in her care, it was not a happy time for them, as they were in a studio flat and financially struggling; A was apparently being bullied at school. The mother suggested that if she organised a different school for A in London, this would materially moderate A's objections. She has filed evidence confirming that she has obtained a place for B at his former school in London. During her submissions, the mother took many opportunities to argue that it was the father who had obviously failed the children, not herself. She doubted the relevance of the *1980 Hague Convention* cases, given their very different facts, and the different jurisdiction in which the issues arose.

64. As indicated earlier (§59), the mother disputes that the children are close as siblings, and therefore challenges the assertion that any possible separation would be contrary to their interests. She did not recognise the father's description of their closeness. She described how A is "not a good example" for B, and indeed spoke of the merits of separating them.

65. The mother explained that the 29 September 2020 e-mail (§51 above) was written when she was very distressed, and that it should not be treated as a reliable indicator of her current views.

The father

66. As I have earlier indicated (see §44 and §58), the father unsurprisingly supports the application of the children.

Conclusion on the application at §1(i): rescission or variation

67. The hearing was set up to consider three questions. Having heard submissions, I reached the clear view in answer to the question at §1(i) above that the children have made good their case that the order of HHJ Wright should be rescinded on the basis that the circumstances have changed since December 2020.

68. While accepting that the line of *1980 Hague Convention* cases on which I was addressed are plainly distinguishable factually, and are set in a different jurisdictional framework, they provide a useful illustration of the circumstances in which the hardened views of a competent child, or the more clearly/vividly articulated/expressed views of a competent child (in each case cited, younger than A and B – significantly younger than A), can represent a sufficient change of circumstances as to warrant the rescission of an earlier order. Notably, in those cases, the children's views were pitched against the powerful policy considerations which obtain under the *1980 Hague Convention*, in contrast to the position here, where the issue is raised only in the context of welfare proceedings.

69. I am in no doubt whatsoever that both children have expressed clear and emphatic views to Mr Netto; these are strongly and firmly pitched against a return to England and/or to the care of their mother. What is difficult for me in this case is to assess whether these clearly expressed views have sufficiently hardened or strengthened since the hearing in December 2020 as to be called a 'change of circumstance'; it is apparent, for instance, that as long ago as November 2019 A was described as having a "radical aversion to living with her mother again". Frustratingly, the judgment of HHJ Wright gives me no clearly defined baseline against which to assess how their currently articulated wishes

and feelings have moved in the last nine months. Moreover, I take into account, as the mother argued, that the children have not seen her for a very long time, and that this factor (which was known in December 2020) may well be influencing their developing views. I am not in the circumstances able to conclude that there has been such a hardening of either child's views since December 2020 as to find that there has been a material 'change of circumstances' in this regard.

70. However, I am satisfied that in the nine months since the hearing before HHJ Wright the dynamic of the case has indeed shifted materially to expose the real prospect of sibling separation if the order of HHJ Wright is upheld, which was plainly not contemplated by HHJ Wright. A's increasingly firmly worded opposition to returning to England, maturely articulated to Mr Netto, render the prospect of enforcement of this order in relation to her, at very nearly 18 years old, not just unrealistic, but actually unachievable. I am satisfied that in her heart of hearts the mother probably realises this (reference what she earlier said in her e-mail which I have reproduced at §51). If A cannot be returned now, then HHJ Wright's order could or would lead to a sibling separation. I am wholly persuaded, from what the children and the father have independently said, that separating A and B would be strongly opposed by both children and would, on the face of all of the information available to me, be contrary to their best interests, as reflected by the UN Convention (see §60 above). It seems highly likely to me that they have found, and benefited from, considerable support from each other in the many years in which these parents have been warring about their future; this is apparent from what they have said to Mr Netto and chimes with the father's assessment. The mother, who has not seen them recently, is not in such a good position to speak for their current relationship.

71. The real prospect now of separating these children, who are in my finding close if not 'inseparable', was plainly not foreseen at the time of HHJ Wright's judgment and order. This endows this court with both the means under *section 31F(6)* and the welfare imperative to rescind the return orders made by HHJ Wright. That is the conclusion which I have reached.

Should there be a request for transfer to the Courts of Spain under Article 15

72. Given that this application seeks the rescission (or variation) of an order made in proceedings which were launched before 31 December 2020, the provisions of *Council Regulation 2201/2003* ("*BIIR*") apply. Had the relevant application been issued after 1 January 2021, broadly similar provisions in *Articles 7* and *8* of the *1996 Hague Convention* would have applied.

73. The provisions of *Article 15(1)* are well-known and replicated here for ease of reference:

> "1 By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

> (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
>
> (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5".

74. The *Article 15* application in this case has been initiated by the Applicants (see *Article 15(2)(a)*). The mother opposes this transfer; the father supports the application. As Mr Goodwin was at pains to point out at the hearing, this is simply a jurisdiction issue; the mother will not be precluded from arguing all the points which she wishes to raise in Spain (including the argument that the children should be restored to her care) should the proceedings be transferred there.

75. As has been made clear (see Munby J as he then was in *AB v JLB (BIIR: Article 15)* [2009] 1 FLR 517, in a passage recently endorsed by the Court of Appeal[10]), there are three main questions which arise:

i) Does the child have a "particular connection" with the relevant other member state? The child will have a 'particular connection' if his situation falls within one of the situations described in *Article 15(3)* which include (for present purposes) that the member state is the 'habitual residence of a holder of parental responsibility';

ii) Would the other member state be better placed to hear the case or a specific part thereof?

iii) Would a transfer to the other court be in the best interests of the child?

76. As to the third of those considerations, Baroness Hale in *Re N (Adoption: Jurisdiction)* [2016] UKSC 15 concluded her review at [44] in this way:

> "The question remains, what is encompassed in the "best interests" requirement? The distinction drawn in *In re I* remains valid. The court is deciding whether to request a transfer of the case. The question is whether the *transfer* is in the child's best interests. This is a different question from what eventual *outcome* to the case will be in the child's best interests. The focus of the inquiry is different, but it is wrong to call it "attenuated". The factors relevant to deciding the question will vary according to the circumstances. It is impossible to be definitive. But there is no reason at all to exclude the impact upon the child's welfare, in the short or the longer term, of the transfer itself. What will be its immediate consequences? What impact will it have on the choices available to the court deciding upon the eventual outcome? This is not the same as deciding what outcome will be in the child's best interests. It is deciding whether it is in the child's best interests for the court currently seised of the

[10] *Re KN (Article 15 Transfer)* [2020] EWCA Civ 1002, [2020] All ER (D) 165, [30]

> case to retain it or whether it is in the child's best interests for the case to be transferred to the requested court". (Emphasis by italics in the original).

And at [57]:

> "… the language of *article 15.1* is simple and clear. It requires no gloss or explanation. The court has three questions to answer: does the child have a particular connection (as defined in *article 15.3*) with another member state; would a court in that member state be better placed to hear the case, or a specified part of it; and would this be in the best interests of the child? The "better placed" and "best interests" questions are separate questions and the "best interests" question is intended to be an additional safeguard for the child. The question is not what eventual outcome to the case will be in the best interests of the child but whether the transfer will be in her best interests. Subject to that, the scope of the inquiry will depend upon all the circumstances of the case".

77. The mother contends that the Family Court in this country should retain jurisdiction to consider the future welfare of the children.

Conclusion on §1(ii): Article 15

78. Having carefully considered the provisions of *Article 15*, and the arguments above, I have reached the clear view that it would be right for me to request a court in Spain to assume jurisdiction, and to transfer the case to the courts there. I so conclude for the following reasons:

    i) The children clearly have a "particular connection" with Spain; it is undoubtedly where the father (one of the two holders of Parental Responsibility) is habitually resident;

    ii) The courts in Spain would be better placed to hear the case; there are (I am satisfied) ongoing proceedings in Spain which can in fact absorb these proceedings; the children themselves are in Spain (and have been for some time) and can more easily engage (as appropriate) with those proceedings, and with any professional instructed within them; the mother is Spanish, with family in Spain; she has state-funded Spanish lawyers already instructed;

    iii) It is in the best interests of the children that the proceedings are transferred to Spain, where they live; the children have lived there for many months; they are schooled there, and their friends are there; they are nationals of Spain. As I have made clear above, they are adamant that they do not want to be in England at present, and this would make their active participation or engagement in English Court proceedings extremely challenging.

79. I propose to stay the English proceedings for the time being and shall ask the Central Authority to assist in communicating this decision to the Spanish authorities.

80. It is incumbent on me, when extending the invitation under *Article 15* to "set a time limit by which the courts of that other member state shall be seised". Mr Goodwin proposes that I should set a long-stop deadline of 6 months. That is too far into the future, in my view. I propose to direct that that the courts of Spain should be seised of this case by 30 November 2021.

Conclusion

81. I earnestly hope that these orders will pave the way now for the parties to engage in some form of mediation or other non-court dispute resolution in order to achieve a degree of consensus for the children. I am aware that the father has made efforts to progress matters this way. At the end of this long judgment, I hope that the parties will forgive my bluntness: it is blindingly obvious that the children crave a cessation to current parental hostilities. They feel that they have been on the side-lines "whilst the two of them just fight". A has said, in terms, and with more than enough justification, that she is "tired" and "fed up" of her parents' litigation, "really stressed" by the court processes, and feels that "enough is enough". I suspect that it is only when the parents are prepared to lay down their litigation arsenal, and start to talk, will the children feel able to engage with them meaningfully (particularly the mother who has a lot to lose by not heeding this advice) in planning for their future in such a way as involves *both* parents.

82. That is my judgment.