Neutral Citation Number: [2016] EWHC 616 (Fam)

Case No: FD15P00621

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2016

Before:

THE HONOURABLE MR JUSTICE MACDONALD

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Between:

Madonna Louise Ciccone	**Applicant**
- and –	
Guy Stuart Ritchie	**First Respondent**
- and -	
Rocco John Ritchie	**Second Respondent**

(No 2)

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- -

Mr. David Williams QC and Miss. Jacqueline Renton (instructed by **Payne Hicks Beach**) for the **Applicant**
Mr. Alex Verdan QC and Mr. Michael Gration (instructed by **Stewarts Law**) for the **First Respondent**
Mr. Henry Setright QC and Mr. Edward Devereux (instructed by **Goodman Ray**) for the **Second Respondent**
Mr. Adam Wolanski appeared on behalf of **News Group Newspapers** and **Associated Newspapers Limited**

Hearing dates: 10 and 11 March 2016

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Approved Judgment

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

.....

THE HONOURABLE MR JUSTICE MACDONALD

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

Mr Justice MacDonald:

Introduction

1. This is the final hearing in proceedings under the 1980 Hague Convention in relation to Rocco John Ritchie, who is now aged 15 years and seven months. Rocco is the son of Ms. Madonna Ciccone and Mr. Guy Ritchie. The court is, at this hearing, concerned primarily with the mother's application for permission to withdraw her application under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter the 1980 Hague Convention).

2. The mother is represented by Mr. David Williams QC and Miss. Jacqueline Renton. The father is represented by Mr. Alex Verdan QC and Mr. Michael Gration. Rocco is represented by Mr. Henry Setright QC and Mr. Edward Devereux. I am grateful to leading and junior counsel and their respective solicitors for the impeccable manner in which this matter has been prepared and presented to the court.

3. The press have attended this hearing in some numbers pursuant to the provisions of FPR 2010 r 27.11(2)(f), which provisions permit duly accredited representatives of news gathering and reporting organisations to attend proceedings in the family courts held in private. Neither the parents nor Rocco sought to exclude the press from the courtroom.

4. The provisions in the rules that permit the attendance of the media during hearings held in private do not alter the statutory provisions and rules governing the publication of information relating to those proceedings. During the course of the hearing I have regulated what the press can publish in respect of the hearing by means of interim reporting restriction orders made at a pre-hearing review on 3 March 2016 and at the end of the first day of this substantive hearing. At the conclusion of this hearing I made a further and comprehensive reporting restriction order.

5. On the second day of this hearing Mr. Adam Wolanski appeared on behalf of News Group Newspapers and Associated Newspapers Limited. Those news organisations made an application that their reporters be permitted to report all that has been said during the course of this hearing. Further, they applied, pursuant to Paragraph 18 of the President's Practice Guidance of 16 January 2014 entitled *Transparency in the Family Courts: Publication of Judgments*, for the judgment I gave on 3 February 2016 following the hearing on 21 December 2015, and this judgment to be published. As always, Mr Wolanski's submissions were measured and realistic.

Essential Background

6. The background to this matter is set out in the judgment I gave on 3 February 2016, following the hearing on 21 December 2015, setting out my reasons for joining Rocco as a party to these proceedings (see *Ciccone v Ritchie (No 1)* [2016] EWHC 608 (Fam)). I shall not therefore repeat the background facts here save for the following.

7. On 21 December 2015 the mother issued proceedings under the 1980 Hague Convention for the summary return of Rocco to the jurisdiction of the United States of America, and specifically New York State.

8. Thereafter, on 23 December 2015 the mother commenced proceedings in the Supreme Court of the State of New York. As I noted in my previous judgment, following the end of the parents' marriage the arrangements for Rocco were agreed in February 2009 by way of a consent order approved by the Senior District Judge in the Principal Registry of the Family Division. On 27 March 2009 the order of the Senior District Judge was registered in the State of New York by the Supreme Court of the State of New York, by which registration the order of the Senior District Judge is deemed to have the same force and effect as an order of, and is enforceable as if it were issued by, a court of the State of New York.

9. The current proceedings in New York are being heard by The Honourable Justice Deborah Kaplan. They are taking place in open court in line with the practice in that jurisdiction. At one point in these proceedings it was proposed that judicial liaison should take place between Judge Kaplan and myself. However, having had, very helpfully, sight of full transcripts of the hearing that took place in New York on 23 December 2015 and a transcript of a conference call hearing before Judge Kaplan on 2 March 2016 it was not necessary for me to take up Judge Kaplan's valuable time making enquiries as to what had transpired in the proceedings in New York.

10. The transcripts of the hearing and the conference call hearing before Judge Kaplan indicate the following matters germane to the issues that have arisen for determination at this hearing:

    i) On 23 December 2015 Judge Kaplan directed that Rocco return to New York. Rocco has not returned to New York.

    ii) On 2 March 2016, having noted the "*extraordinary media coverage*" that the proceedings in the United States had attracted, and having weighed the welfare of the child and the potential harmful effects of disclosing information to the public against the constitutional and statutory imperatives favouring open justice, Judge Kaplan declined the parties' application to close the courtroom to the press on the grounds that the parties had not met the burden to show a compelling interest that would justify the closing of the courtroom.

    iii) Whilst declining to vacate her order for return, Judge Kaplan made clear on 2 March 2016 that she was not issuing a warrant for the father and was not making any order that Rocco be removed from school in England.

    iv) On 2 March 2016 Judge Kaplan repeated her plea to the parties to work together to settle matters for the benefit of Rocco.

11. The mother accepts that the Supreme Court of the State of New York has jurisdiction in this matter. The father made clear during the course of this hearing through Mr. Verdan that he, likewise, accepts that the New York Court has jurisdiction, albeit at the outset of the hearing Mr. Verdan submitted that this court should make certain substantive welfare orders in respect of Rocco. Whilst in his Skeleton Argument Mr. Setright undertook an analysis of the jurisdictional position in this case (including an analysis of habitual residence) and submits that this court should, upon the withdrawal of these proceedings, give certain procedural directions aimed at any future applications made in this jurisdiction, he does not suggest at this time that Rocco disputes the jurisdiction of the court in New York. Within this context, and with

respect in particular to orders originally sought by the father, Mr. Williams submitted that it would be wrong for the English court to seek to "*park its tanks*" (to use his phrase) on the front lawn of the United States by taking any steps beyond those necessary to effect the withdrawal of the proceedings under the 1980 Hague Convention.

12. Within the foregoing context, at the point that this final hearing commenced on 10 March 2016 the case had reached a rather curious position.

13. The mother sought to withdraw proceedings under the 1980 Hague Convention for the summary return of Rocco to the United States of America but continued, at least formally, to seek his return under the auspices of an order made in the proceedings in New York. The mother contends she is entitled to withdraw her proceedings under the 1980 Hague Convention without the need for permission from the court.

14. The father continued to object to the return of Rocco to the United States of America. However, the father argued that (a) the mother requires permission to withdraw her proceedings under the 1980 Hague Convention, the test for permission being Rocco's best interests, and (b) that the court has jurisdiction to make, and should make, substantive welfare orders in respect of Rocco to protect his position within this jurisdiction. Within this context, the Position Statement lodged on behalf of the father for the pre-hearing review on 3 March 2016 raised the possibility of the court refusing the mother permission to withdraw her application under the 1980 Hague Convention on welfare grounds and thereafter determining certain welfare issues identified by the father within these proceedings. The father had issued no separate application to that end.

15. Thus the parent *seeking* return sought to abandon her application for an order for return and the parent *opposing* return sought, nominally, to resist the withdrawal of an application designed to achieve that end, at least until further substantive welfare orders were made. The reason that the position I have described has arisen is tolerably clear. The mother continues, at least formally, to seek the return of Rocco to the United States of America but has come to see the proceedings under the 1980 Hague Convention in this jurisdiction as redundant to achieving that end in circumstances where the New York Court has acted promptly in hearing the case. The father objects to the return of Rocco to the United States but considers that the continuation of proceedings under the 1980 Hague Convention provides a shield against what he considers to be the Sword of Damocles hanging over his head in the form of the proceedings in the United States, or at least a vehicle for seeking substantive welfare orders to secure Rocco's continued position in this jurisdiction.

16. For his part, Rocco welcomes his mother's decision to withdraw her proceedings under the 1980 Hague Convention as a substantive step toward that which he most desires, namely an end to *all* litigation between his parents in respect of him. As noted above, on behalf of Rocco Mr. Setright submits that upon the withdrawal of the proceedings the court should give certain procedural directions aimed at any future applications made in this jurisdiction. The directions sought are (i) that the mother will make no without notice applications in relation to Rocco in this jurisdiction, (ii) that notice of no less than seven days will be given of any applications, (iii) that the mother will raise no objection to Rocco being joined as a party to any application and (iv) that Ms Ray shall be appointed as Rocco's Guardian in any application that

requires him to have a Guardian. Mr. Setright also suggests that any future applications in this jurisdiction be reserved to me.

17. During the course of Mr. Verdan's oral submissions it became apparent that the father in fact no longer seeks substantive welfare orders in respect of Rocco within the context of, or upon the conclusion of these proceedings. The father now limits himself to seeking those procedural directions sought by Mr. Setright on behalf Rocco. The father further made clear through Mr. Verdan that he does not object to the withdrawal of the proceedings under the 1980 Hague Convention, although he continues to maintain that the mother requires permission to withdraw.

The Remaining Issues

18. Accordingly, the substantive issues that remain for determination in this case are as follows:

    i) Does an applicant applying for relief under the 1980 Hague Convention require permission under FPR 2010 r 29.4 before that applicant can withdraw his or her application and, if so, what is the test for permission?

    ii) Once an application for relief under the 1980 Hague Convention has been withdrawn to what extent is the court able to give procedural directions aimed at any future applications that may be made in this jurisdiction?

    iii) What arrangements should be made in respect of Rocco's passport upon the conclusion of these proceedings?

19. The first point, as Mr. Setright rightly points out, might be considered somewhat arid in circumstances where no party now objects to the withdrawal of the proceedings under the 1980 Hague Convention. However, in circumstances where I have received extensive submissions on the question and where there is, as far as leading and junior counsel have been able to ascertain, no authority directly on the point, I am invited by all parties to determine the issue.

20. In addition to the substantive issues set out above, there is one further issue that falls for determination (I having dealt with the question of a reporting restriction order in an *ex tempore* judgment given at the conclusion of the hearing late on Friday afternoon), namely whether my judgment of 3 February 2016 following the hearing 21 December 2015 and / or this judgment should be published and, if so, in what form.

21. Finally, at the start of the hearing there existed an issue between the parties about the extent to which they were entitled in proceedings in this jurisdiction to refer to without prejudice negotiations taking place in New York. In the event however, it was not necessary to examine that issue and I say no more about it here.

Submissions

The Mother

(i) Application to Withdraw

22. Mr. Williams QC and Miss. Jacqueline Renton submit on behalf of the mother that the permission of the court is not required for her to withdraw her application under the 1980 Convention. Mr. Williams submits that FPR 2010 r 29.4(1)(b) governing applications for permission to withdraw with respect to applications in proceedings regulated by FPR 2010 Part 12 (which include applications in proceedings under the 1980 Hague Convention) is to be read as applying only to such applications as relate to the welfare or upbringing of a child.

23. Developing his submission, Mr. Williams says that proceedings under the 1980 Convention are not proceedings which relate to the welfare or upbringing of the child, relying in support of this submission on Paragraph 19 of the *Explanatory Report of Eliza Perez-Vega* and the judgment of the Supreme Court in *In Re E (Children)(Abduction: Custody Appeal)* [2012] 1 AC 144 at [13] in which it was held that proceedings under the 1980 Hague Convention are not proceedings in which the upbringing of the child is in issue but rather are proceedings about where the child should be when that issue is decided. Hence, submits Mr. Williams, proceedings under the 1980 Hague Convention do not fall within FPR 2010 r 29.4(1)(b).

24. Within this context and in support of his submission, Mr. Williams says that it would be curious if, having been prohibited during the course of proceedings under the 1980 Hague Convention from having regard to the welfare of the child, the court became subject to a duty to consider the child's welfare upon an application to withdraw those proceedings. Further, Mr. Williams submits that if permission is required to withdraw proceedings under the 1980 Convention then there is a possibility that such permission will be refused. What, asks Mr. Williams rhetorically, happens then? Does the court compel a party to pursue an application they do not wish to prosecute? If a party simply refuses to prosecute an application does the court proceed to hear it in any event?

25. Finally, Mr. Williams relies on the decision of Holman J in *AA v TT (Recognition and Enforcement)* [2015] 2 FLR 1 as authority for the proposition that permission is not needed to withdraw proceedings under the 1980 Hague Convention.

(ii) Orders

26. Mr. Williams concedes that the court has jurisdiction to make ancillary orders at the conclusion of proceedings under the 1980 Convention to give effect to an outcome arrived at in those proceedings. Mr. Williams however submits that none of the directions sought by Mr. Setright, which Mr. Williams characterises as "*anticipatory procedural orders*", fall within that compass. In any event, Mr. Williams submits that, save for a direction that any further applications in this jurisdiction be reserved to me (which direction Mr. Williams does not seek to oppose), all the provisions sought by Mr. Setright are provided for in the rules or case law, to which rules and case law the mother's representatives would be expected to adhere upon issuing any further application in this jurisdiction. Within this context, Mr. Williams argues that it would

not be proper to make anticipatory directions in relation to proceedings that have not yet been, and may never be issued. The only order the mother invites the court to make concerns the treatment of Rocco's passport.

(iii) Publication of Judgments

27. Mr. Williams submits that my judgment of 3 February 2016 following the hearing on 21 December 2015 and this judgment should not be published. He argues that the President's Practice Guidance of 16 January 2014 *Transparency in the Family Courts: Publication of Judgments* does not mandate the publication of the judgments, the judgments not falling within the categories set out in Schedule 1 and Schedule 2 of that Guidance. Further, Mr. Williams submits that, even were the judgment anonymised, the parties will be easily identifiable by virtue of a 'jigsaw effect', allowing the world at large to see the parties' respective positions on the case management issues dealt with by the judgments. Finally, Mr. Williams submits that the judgment of 3 February 2016 determines no new legal issues of public importance.

The Father

(i) Application to Withdraw

28. Mr. Verdan QC and Mr. Gration submit on behalf of the father that the permission of the court is required before an applicant in proceedings under the 1980 Hague Convention can withdraw that application.

29. Mr. Verdan submits that, reading the totality of FPR 2010 r 29.4 demonstrates that r 29.4(1)(b) is to be read disjunctively and that, accordingly, an applicant in proceedings under the 1980 Hague Convention governed by FPR 2010 Part 12 will always require the permission of the court to withdraw that application.

30. Further, Mr. Verdan submits that having regard to the totality of FPR 2010 r 29.4 there is no necessary link between permission to withdraw and the welfare principle in s 1(1) of the Children Act 1989 in circumstances where the rule applies to applications in proceedings that do not, or need not concern the welfare or upbringing of a child. Thus, submits Mr. Verdan, the mere fact that proceedings under the 1980 Hague Convention do not concern the welfare or upbringing of a child is not sufficient to take them outside the scope of FPR 2010 r 29.4.

31. Mr. Verdan submits that the decision of Holman J in *AA v TT (Recognition and Enforcement)* [2015] 2 FLR 1 is not authority for the proposition that permission is not needed to withdraw proceedings under the 1980 Hague Convention as Holman J was not, in the context of the application to withdraw in that case being uncontested, invited to, or required to consider the application of FPR 2010 r 29.4 to such proceedings.

32. Notwithstanding the submission he makes that there is no necessary link between permission to withdraw and the welfare principle in s 1(1) of the Children Act 1989, Mr. Verdan submits that the test for determining whether an applicant should be given permission to withdraw proceedings under the 1980 Hague Convention is the child's best interests, the application to withdraw being itself, says Mr. Verdan, a question

with respect to the upbringing of a child. In respect of the latter proposition, Mr. Verdan relies on the decision of Bracewell J in *Re N (Leave to Withdraw Care Proceedings)* [2000] 1 FLR 134. Within this context, Mr. Verdan submits that on an application for permission to withdraw the child's best interests will be either the court's paramount consideration or a primary consideration.

(ii) Orders

33. As noted above, during the course of his submissions, Mr. Verdan indicated that the father no longer seeks welfare orders in respect of Rocco within the context of these proceedings. Mr. Verdan submits that the court should give directions aimed at any future proceedings in this jurisdiction at the conclusion of proceedings under the 1980 Hague Convention and invites the court to give those directions sought by Mr. Setright on behalf of Rocco. In relation to Rocco's passport the father considers the same should be held by Ms Ray to the order of this court.

(iii) Publication of Judgments

34. On the issue of whether my judgment of 3 February 2016 following the hearing on 21 December 2015 should be published, on behalf of the father Mr. Verdan highlights once again the extraordinary degree of publicity that has attended this case worldwide. He further highlights the fact that, pursuant to that which has already been reported in this case within the confines of s 12 of the Administration of Justice Act 1960, the public are already aware that the mother has made an application under the 1980 Hague Convention, that Rocco is a party to the proceedings with his own legal representation, that the dispute concerns whether Rocco should return to the jurisdiction of the United States, that the mother is seeking to withdraw her application and that this hearing has been listed to determine that issue.

35. Within this context, and in particular having regard to the extent of information already in the public domain concerning this case, Mr. Verdan submits that even were it possible to identify the parties by means of 'jigsaw' identification it is difficult to see what further harm the publication of the judgments might cause.

Rocco

(i) Application to Withdraw

36. Having made clear that Rocco welcomes his mother's decision to withdraw her proceedings under the 1980 Convention as a substantive step toward that which he most desires, namely an end to *all* litigation between his parents in respect of him, Mr. Setright QC and Mr. Devereux very properly did not on behalf of Rocco descend fully into the arena on the issue of whether permission is required to withdraw an application under the 1980 Hague Convention.

37. However, Mr. Setright made the following observations pertinent to the question of whether permission to withdraw is required:

    i) If the rules had intended that an applicant for relief under the 1980 Hague Convention should be able to withdraw that application as of right the rules

would have provided simply for a notice of withdrawal to be filed, which they do not do;

ii) The FPR 2010, which provide the procedural framework for applications under the 1980 Hague Convention, place greater emphasis on the duty of the court to control its own process by actively managing cases with a view to furthering the overriding objective under FPR 2010 r 1.1. The requirement of permission to withdraw is, says Mr. Setright, consistent with that increased emphasis; and

iii) In many cases (although not in all and not in this one) the withdrawal of proceedings will signal an acceptance that the child is to return by agreement or remain in this jurisdiction. In this context the court may well wish to consider the terms of the withdrawal and any consequential steps that need to be taken to settle the child's arrangements. Within this context Mr. Setright submits that the requirement of permission is consistent with ensuring the court has an opportunity to actively manage the conclusion of the proceedings.

(ii) Orders

38. Mr. Setright submits that the court should give directions at the conclusion of proceedings under the 1980 Hague Convention without prejudice as to jurisdiction aimed at any future proceedings that may be launched in this jurisdiction. Mr. Setright submits that such directions will *regulate* as oppose to *adjudicate* in respect of any such future proceedings in this jurisdiction. He characterises the directions he seeks as protective in the sense that they will mean that Rocco will have some reassurance as to his position in any future proceedings in this country and will not have to be watchful or anxious in respect of the same. With respect to his passport, Rocco would simply like to have his passport to enable him to go on holiday at Easter.

(iii) Publication of Judgments

39. Mr. Setright submits that the judgment of 3 February 2016 given following the hearing on 21 December 2015 is of interest to the wider legal community (in particular in respect of the issue of the 'voice of the child'), that the parties can be protected by anonymisation of the judgment and that, even were anyone to deduce through 'jigsaw' identification who the parties are the publication of the same would remain a contempt of court under the requisite rubric. In these circumstances, Mr. Setright submits on behalf of Rocco that the judgment of 3 February 2016 and this judgment should be published in an anonymised form.

News Group Newspapers and Associated Newspapers Limited

40. Mr. Wolanski has made submissions on the application for the publication of my judgments and on the application for an order relaxing the automatic statutory restrictions on publication so as to permit his client news organisations to report all that has been said at this hearing. I dealt with the latter application in an *ex tempore* judgment given at the end of the hearing. In summary, I permitted the press to report what they had heard during the course of the hearing subject to a relatively extensive reporting restriction order which prohibited the press from reporting a number of identified matters.

41. In support of the application for the publication of my judgments, and accepting that both judgments fall into the category of judgments where the court is invited to exercise its discretion to publish upon the application of a party or the press, Mr. Wolanski submits that the President's Guidance demonstrates a clear intention to make more judgments available to the public in order to increase public understanding of the work of the family courts. Mr. Wolanski submits that the judgments in this case should be published to that end.

42. Mr. Wolanski further submits that, subject to the need to remove especially sensitive matters, the judgments should not be anonymised prior to publication. Mr. Wolanski submits that the President's Guidance contemplates, in Paragraph 2, the publication of judgments that are not anonymised. Within this context, and in any event, Mr. Wolanski points to the extensive publicity that there has already been in this case as a result of the proceedings in the United States, with much of the information dealt with in this hearing already in the public domain by reason thereof.

43. To demonstrate this, Mr. Wolanski took the court to but one article from the Daily Mail Online first published on 2 March 2016, the day of the conference call hearing between Judge Kaplan and the parties' US Attorneys. That article contained the following information:

    i) The circumstances of the parents' divorce and the fact that Rocco's living arrangements had been settled under the terms of a legally binding agreement reached in 2008 (in fact 2009);

    ii) Rocco's current living arrangements, his wish to remain in England and his mother's wish for him to return to New York;

    iii) The fact that an issue of alleged contempt and the possibility of the arrest of the father had been raised in the proceedings in New York and that Judge Kaplan declined to issue a warrant;

    iv) Verbatim quotes from submissions made by the each of the parties' US Attorneys to Judge Kaplan, including the submissions made by the Attorneys concerning the progress of negotiations and the parties respective views on the same;

    v) The fact that the lawyers for both sides grew "*increasingly ill tempered*" during the course of the hearing on 2 March 2016 in New York;

    vi) What the parents said during the hearing (limited on that occasion to confirming that they were on the conference call);

    vii) A still photograph of the conference call hearing on 2 March 2016 permitted by Judge Kaplan and showing the lawyers in the courtroom;

    viii) The fact that Judge Kaplan had scolded both parties, pointed out Rocco's wish for his parents to come to an amicable settlement and urged them to settle, including verbatim quotes of what the learned Judge said to the parties;

ix) The fact that a hearing would be taking place in London on 3 March 2016 (which fact was mentioned in open court in New York on 2 March 2016);

x) Comment and analysis of the case from other US Attorneys not involved in the proceedings;

xi) Library pictures of the parents and of Rocco in other settings.

44. Within the context of what he characterises as an unprecedented level of press coverage for a family case, Mr. Wolanski submits that it would be entirely unrealistic to think that the judgments given by this court could be anonymised to the extent required to ensure the parties were not identified, whilst at the same time remaining a means by which what the court has done in this case can be understood by the public at large. Further Mr. Wolanski submits that, in the context of the extensive amount of highly detailed publicity this case has already garnered since 23 December 2015, to publish versions of the judgment without anonymisation would not, in the particular circumstances of this case, be detrimental to Rocco.

The Law

Permission to Withdraw

45. FPR 2010 r 29.4 provides as follows in respect of permission to withdraw an application:

> **29.4 Withdrawal of applications in proceedings**
>
> (1) This rule applies to applications in proceedings –
>
> (a) under Part 7;
>
> (b) under Parts 10 to 14 or under any other Part where the application relates to the welfare or upbringing of a child or;
>
> (c) where either of the parties is a protected party.
>
> (2) Where this rule applies, an application may only be withdrawn with the permission of the court.
>
> (3) Subject to paragraph (4), a person seeking permission to withdraw an application must file a written request for permission setting out the reasons for the request.
>
> (4) The request under paragraph (3) may be made orally to the court if the parties are present.
>
> (5) A court officer will notify the other parties of a written request.
>
> (6) The court may deal with a written request under paragraph (3) without a hearing if the other parties, and any other persons directed by the court, have had an opportunity to make written representations to the court about the request.

46. The question to which this case gives rise is whether FPR 2010 r 29.4 applies to applications in proceedings under the 1980 Hague Convention and, if so, what the test is for giving permission to withdraw in such cases.

47. As set out above, there is no authority precisely on this point. In respect of proceedings under the 1980 Convention some authorities appear to have proceeded on the basis that permission to withdraw is not required (see *AA v TT (Recognition and Enforcement)* [2015] 2 FLR 1) and some on the basis that it is required (see *Re G (Abduction: Withdrawal of Proceedings, Acquiescence and Habitual Residence)* [2008] 2 FLR 351 at [16] setting out the terms of an order made earlier in those proceedings and the recent decision of the President in *Re D (Children)(Child Abduction Practice)* [2016] EWHC 504 (Fam)). In none of those cases however, was the court requested to consider whether the permission of the court to withdraw was mandated by r 29.4 in this context.

48. Anecdotally, my (admittedly limited) experience suggests that many practitioners do consider that the permission of the court is required to withdraw applications in proceedings under the 1980 Hague Convention and I have certainly endorsed a number of orders which provide for such permission in cases where an applicant has decided, for whatever reason, not to proceed.

49. The remaining authorities on permission to withdraw concentrate exclusively on public law proceedings under Part IV of the Children Act 1989 (see *Re N (Leave to Withdraw Proceedings)* [2000] 1 FLR 134, *WSCC v M, F, W, X, Y and Z* [2011] 1 FLR 188 and *Redbridge LBC v B and C and A (Through his Children's Guardian)* [2011] 2 FLR 117). These authorities make clear that in public law children proceedings, where the threshold is capable of being crossed the test for whether permission should be given for care proceedings to be withdrawn is the welfare of the child.

50. However, care must be taken in relying on these authorities in the context of the question at issue before this court. First, those authorities were decided under the Family Proceedings Rules 1991 r 4.5 which, as detailed below, differs substantially from FPR 2010 r 29.4. Second, and importantly, the conclusions in those authorities that the question of whether care proceedings should be withdrawn is a question which concerns the welfare or upbringing of a child, and that the test for whether permission should be given is the welfare of the child, are grounded firmly in the fact that the upbringing of the child is the main question falling for determination in such proceedings (see *London Borough of Southwark v B* [1993] 2 FLR 559 at 572).

51. It is important to note that the procedural requirement of permission for the withdrawal of proceedings is not limited to cases involving children, either in FPR 2010 r 29.4 or more widely. FPR 2010 r 29.4(1)(a) applies r 29.4 to applications in proceedings under Part 7 of the FPR 2010, namely applications in matrimonial and civil partnership proceedings, and is not qualified as only applying where the application concerns the welfare or upbringing of a child. Accordingly, pursuant to FPR 2010 r 29.4(1)(a) permission is required to withdraw an application for a marriage or civil partnership order governed by FPR 2010 Part 7 notwithstanding the proceedings do not concern the welfare or upbringing of a child. There are also other areas of law where permission is required to withdraw an application in proceedings.

For example, under the Insolvency Act 1986 s 266(2) a bankruptcy petition may not be withdrawn without the leave of the court.

52. Finally, and within this context, when considering both the scope of the application of FPR 2010 r 29.4 and the test for permission under it, it is very important to read FPR 2010 r 29.4 in its proper context. That context includes the fact that the FPR 2010 represents a new procedural code with "*the overriding objective of enabling the court to deal with the case justly, having regard to any welfare issues involved*" (FPR 2010 r 1.1). The court must give effect to the overriding objective when it exercises any power under the FPR 2010 (FPR 2010 r 1.2(a)) and has a duty to further the overriding objective by actively managing the case (FPR 2010 r 1.4(1)). Pursuant to FPR 2010 r 1.2(b) the court must also seek to give effect to the overriding objective when it *interprets* any rule.

Procedural Directions

53. As set out above, no party now seeks to suggest that I should make orders in respect of Rocco's welfare either prior to or subsequent to the withdrawal of the mother's application under the 1980 Hague Convention. Mr. Setright and Mr. Verdan however submit that the court should give directions aimed at any future proceedings in this jurisdiction. All parties agree that provision needs to be made for Rocco's passport upon the conclusion of the proceedings although they differ as to what that provision should be.

54. Within this context I note that, save for a direction reserving any future application to me, the matters which Mr. Setright seeks to address by way of what might be termed anticipatory case management directions are each dealt with in the rules or the case law.

55. The case law and the rules make clear the very limited circumstances in which the mother could proceed on a without notice basis in respect of any future application (see *National Commercial Bank of Jamaica Ltd v Olint Corp Ltd (Jamaica)* [2009] 1 FLR 1405 and FPR 2010 PD20A para 4.3(c)) and in the absence of evidence of relevant litigation conduct, I doubt my power to prohibit a person from commencing proceedings by way of a without notice application. Under FPR 2010 r 12.14(6)(a), and notwithstanding the minimum notice period provided for under FPR 2010 PD12C, the mother would be required to give reasonable notice to the father of the hearing of any application.

56. At the first hearing of any application by the mother in respect of Rocco, and in particular given his age, the court will be required to consider and, subject to the circumstances at the time, is likely to accede to an application for Rocco to be joined as a party (see *Re F (Abduction: Child's Wishes)* [2007] 2 FLR 697). Whilst the provision of a Children's Guardian for Rocco in any application that requires him to have a Guardian will have to be considered in light of the circumstances that persist at the time of any such application, it is generally accepted that there is merit in a Guardian who has previously been appointed for a child being re-appointed in any subsequent proceedings if such an appointment is otherwise appropriate.

Publication of Judgment

57. I set out the principles applicable when deciding whether or not to publish a judgment pursuant to the President's Guidance in my judgment in *H v A (No 2)* [2015] EWHC 2630 (Fam) and I shall not repeat them in detail here. In summary:

i) The public generally have a legitimate, indeed a compelling, interest in knowing how the family courts exercise their jurisdiction.

ii) Paragraph 19 of the Practice Guidance makes clear that in considering whether to publish a judgment the judge shall have regard to all the circumstances, the rights arising under any relevant provision of the European Convention on Human Rights, Art 8 (respect for private and family life) and Art 10 (freedom of expression), and the effect of publication upon any current or potential criminal proceedings.

iii) The exercise of discretion concerning the publication of the judgment will be a simple case management decision to be taken at the conclusion of the judgment and following a broad consideration of the applicable principles with basic reasons;

iv) When conducting a balancing exercise between Art 8 and Art 10, the court applies the four propositions identified by Lord Steyn in *Re S (A Child) (Identification*: *Restrictions on Publication)* [2005] 1 AC 593 at [17]. In applying what Lord Steyn described as the "ultimate balancing test" of proportionality it is important that the court consider carefully whether the order that is being sought is proportionate having regard to the end that the order seeks to achieve;

v) Within the balancing exercise, the child's best interests are not paramount but rather are a primary consideration. Those best interests must accordingly be considered first, although they can be outweighed by the cumulative effect of other considerations;

vi) In undertaking the requisite balancing exercises, the impact of publication on the children must be weighed by the court. Whilst in many cases it will be demonstrated that publicity will have an adverse impact on the child, this will not be the position inevitably. In particular, in each case the impact on the child of publication must be assessed by reference to the evidence before the court rather than by reference to a presumption that publicity will be inevitably harmful to the child.

vii) When the court is considering whether to depart from the principle of open justice it will require clear and cogent evidence on which to base its decision. Some of the evidence on which the requisite balancing exercise is undertaken will necessarily involve a degree of speculation although there comes a point where evidence is not merely speculative but pure speculation.

58. With respect to the latter point, and noting the difference in emphasis between the two jurisdictions, in reaching her decision that there were no compelling reasons to close the proceedings in New York Judge Kaplan cited the following passage from the

decision of the Appellate Division of the Supreme Court of New York, First Department in *Anonymous v Anonymous* 158 A.D.2d 296 (1990) as follows:

> "The unsupported speculation by her counsel as to the deleterious effect the media coverage might have on the child is simply inadequate to overcome the strong presumption that court proceedings be open to the public."

Discussion

Permission

59. I have come to the conclusion that FPR 2010 r 29.4 *does* apply to applications in proceedings under the 1980 Hague Convention, governed as they are by FPR 2010 Part 12 Chapter 6 and that, accordingly, the permission of the court is required to withdraw such proceedings. My reasons for so deciding are as follows.

60. In my judgment this is the plain meaning of FPR 29.4(1)(b). FPR 2010 r 29.4(1)(b) provides that r 29.4 applies to applications in proceedings "*under Parts 10 to 14 or under any other Part where the application relates to the welfare or upbringing of a child*". I am satisfied that r 29.4(1)(b) is to be read disjunctively and that the words "*where the application relates to the welfare or upbringing of a child*" are intended to qualify only the words "*any other Part*" and not the words "*under Parts 10 to 14*". I am reinforced in this view by the fact that Part 10 to Part 14 of the FPR 2010 deal with a wide range of applications that do not, or need not concern the welfare or upbringing of a child.

61. Whilst it might be argued that the use of the phrase "*any other*" in r 29.4(1)(b) demonstrates that Parts 10 to 14 are included in r 29.4 only in so far as they apply to applications concerning the welfare or upbringing of children, if this had been the intention I am satisfied that those who drafted the rules would have said so expressly, rather than leaving it to be implied in circumstances where, as I have said, those Parts also deal with applications that need not, and often will not, concern the welfare and upbringing of children. Further, pursuant to FPR 2010 r 1.2(b) when interpreting r 29.4 I must seek to give effect to the overriding objective in FPR 2010 r 1.1. In my judgment reading r 29.4 in this context further militates against this latter interpretation.

62. FPR 2010 r 29.4 represents a broadening of the type of applications in respect of which permission is required to withdraw when compared with the Family Proceedings Rules 1991. The previous rules, in the form of Part IV of the FPR 1991, made provision for permission to withdraw proceedings only in relation to proceedings under the Children Act 1989 (FPR 1991 r 4.5). For example, although FPR 1991 r 2.8 permitted the discontinuance of a petition for divorce, judicial separation or nullity before service of that petition, the rules made no provision for the proceedings to be withdrawn following service. By contrast, whilst pursuant to FPR 2010 r 7.9 an application for a matrimonial or civil partnership order may be withdrawn at any time before it has been served by giving notice to the court in writing (reflecting the provisions in FPR 1991 r 2.8), pursuant to FPR 2010 r 29.4(1)(a) following service the permission of the court is required before such an application can be withdrawn. Neither FPR 2010 r 29.4(1)(a) or FPR r 29.4(1)(b), which deals with applications in proceedings where either of the parties is a protected

party, are not qualified as only applying where the application concerns the welfare or upbringing of a child.

63. Within the foregoing context, in my judgment interpreting r 29.4 as including within its scope all of the applications governed by Part 10 to Part 14 of the FPR 2010, as opposed simply to those concerned with the welfare or upbringing of a child, is consistent with the overall aim of the FPR 2010 generally and in particular the aim of FPR 2010 Part 1, which requires the court to actively manage the case so as to further the overriding objective of dealing with it justly, having regard to any welfare issues involved.

64. As Mr. Setright points out, the rules that provide the procedural framework for applications under the 1980 Hague Convention (and the framework for all applications under Part 10 to Part 14 of the FPR 2010) place increased emphasis on the duty of the court to control its own process. Mr. Setright further points out that the withdrawal of proceedings under the 1980 Hague Convention (and for other applications under Part 10 to Part 14 of the FPR 2010) will often give rise to the need to consider the terms of the withdrawal and any consequential steps that need to be taken to settle the child's arrangements.

65. In circumstances where FPR 2010 r 1.4(1) subjects the court to an increased duty to actively manage its cases with a view to furthering the overriding objective in FPR 2010 r 1.1 it makes sense for the court to have an increased and more proactive role across a wider range of applications when it comes to the withdrawal of those applications. Within this context, a requirement of permission to withdraw applying in respect of all applications covered by Part 10 to Part 14 of the FPR 2010, including applications under the 1980 Hague Convention governed by Part 12, is consistent with the duty of the court to actively manage the course of proceedings from beginning to end so as to achieve a just outcome for all involved, particularly in the absence of any provisions for giving written notice of withdrawal. It is also of note that many of the applications under Part 10 and Part 11 that need not concern the welfare or upbringing of a child are the type of applications where the court may wish to consider the merits of an application to withdraw. For example, where an applicant for a non-molestation order seeks permission to withdraw the court may wish to satisfy itself that that application is not being made under duress from an abusive partner.

66. In the circumstances, I am satisfied not only that the plain meaning of FPR 2010 r 29.4 is that it applies to all proceedings governed by Part 10 to Part 14 of the FPR 2010, including proceedings under the 1980 Hague Convention, but that that interpretation of r 29.4 is the one that best gives effect to the overriding objective under FPR 2010 r 1.1 pursuant to FPR 2010 r 1.2(b).

67. This leaves the question of what test is to be applied on an application to withdraw proceedings which, as is the case with proceedings under the 1980 Hague Convention, do not concern the welfare or upbringing of the child.

68. Where an application to which FPR 2010 r 29.4 applies does concern the welfare and upbringing of a child the application for permission to withdraw will itself be an application concerning the welfare or upbringing of a child and the test will be the welfare principle set out in s 1(1) of the 1989 Act (see *London Borough of Southwark*

v B [1993] 2 FLR 559 at 572). I am not able however to accept Mr. Verdan's submission that an application for permission to withdraw an application in proceedings under the 1980 Hague Convention is likewise an application that concerns the welfare or upbringing of a child and that, accordingly, the test for permission to withdraw is the best interest of the child as the paramount or a primary consideration.

69. In circumstances where proceedings under the 1980 Hague Convention do not concern the welfare or upbringing of a child, and adopting the analytical approach of the Court of Appeal in *London Borough of Southwark v B*, by parity of reasoning an application for permission to withdraw such proceedings will likewise not concern the upbringing or welfare of the child and the test for permission to withdraw will not be the best interest of the child. But what will be the test?

70. When considering an application under FPR 2010 r 29.4 for permission to withdraw, pursuant to FPR 2010 r 1.2(a) the court must seek to further the overriding objective and must consider those factors set out in FPR 2010 r 1.1(2) to which the court is required to have regard when seeking to do so. Indeed, even where the application concerns the welfare and upbringing of a child, and the welfare of the child is the paramount consideration in determining an application for permission to withdraw, the factors relevant to the application of the overriding objective set out in FPR 2010 r 1.1(2) will also fall to be considered.

71. Within this context, in my judgment, where an application to which FPR 2010 r 29.4 applies is an application that does not concern the welfare or upbringing of a child the test for permission to withdraw will centre on those matters set out in the overriding objective at FPR 2010 r 1(2), including the need to deal with the proceedings expeditiously and fairly, the need to deal with cases proportionately, the need to save expense and the need to ensure the appropriate sharing of the court's resources. That is not to say the court will be prohibited entirely from considering issues of welfare because the overriding objective set out in FPR 2010 r 1.1 requires the court to deal with cases justly "*having regard to any welfare issues involved*". However, in applications for permission to withdraw which do not concern the welfare or upbringing of the child this factor is unlikely to feature heavily, and will in most cases not feature at all, when deciding whether to give permission to withdraw.

72. Finally, there remains the question of why the words "*any other Part*" in FPR 2010 r 29.4(1)(b) are qualified by the words "*where the application relates to the welfare or upbringing of a child*". The reason is in my judgment relatively clear. It would not be a proportionate use of the court's time to consider the question of permission to withdraw in respect of applications concerning the large variety of case management and procedural applications a party is entitled to make under the "*other*" parts of FPR 2010, save in the rare event that such an application could be said to concern the welfare or upbringing of a child.

73. Applying the foregoing principles in this case I am satisfied, having regard to the need to further the overriding objective, that the mother should be given permission to withdraw her application under the 1980 Hague Convention.

74. It would not serve the ends of justice to compel a party to pursue an application under the 1980 Hague Convention that they wish to bring to an end. Indeed, whilst not

ruling out such a course of action entirely, it is very difficult indeed to think of a circumstance where the court would compel an applicant in proceedings under the 1980 Hague Convention to pursue an application they have indicated they wish to withdraw. Further, having regard to the overriding objective, there are positive merits in this case to permitting the mother to withdraw her application in this jurisdiction. As I observed during the course of the hearing, at present the existence of parallel proceedings in two jurisdictions, before two judges with two sets of lawyers is introducing unnecessary and unhelpful complexity and hindering attempts at settlement, as well as incurring considerable expense. Accordingly, I give permission for the mother to withdraw her proceedings under the 1980 Hague Convention.

Procedural Directions

75. I am satisfied that, beyond a direction that any further applications in this jurisdiction in respect of Rocco be reserved to me in the first instance, it is not appropriate for me to make anticipatory directions in respect of any future proceedings. Leaving aside the question of whether I have jurisdiction to do so, it seems to me that in circumstances where each of the anticipatory directions sought is in any event mandated by the rules or the case law or both, which rules and case law, to which I am satisfied that the mother's highly experienced legal team will adhere, it is not necessary for me to make the anticipatory case management directions requested by Mr. Setright and supported by Mr Verdan.

76. Provision is required to be made with respect to Rocco's passport which is currently held by Ms Ray to the order of the court. The court being satisfied that permission should be given for these proceedings to be withdrawn Rocco's passport should be released to him for the purposes of travel at Easter. The parents appear to be in agreement that the passport should otherwise be held by Ms Ray, which seems the eminently sensible course. If this is not the case, then I see no principled reason why Rocco should not retain his own passport pending determination of any issue regarding the same by the New York court.

Publication of Judgments

77. Balancing the competing Art 8 and Art 10 rights, I am satisfied that my judgment of 3 February 2016 following the hearing on 21 December 2015 and this judgment should be published. I am further satisfied that, in the exceptional circumstances of this case and subject to some limited redaction, the judgments should be published without anonymisation. The reporting restrictions in this case will continue to be governed by the order that I have already made and will apply to the reporting of my published judgments. My reasons for so deciding are as follows.

78. The starting point in this case must be that it will simply not be possible for the court to produce an anonymised version of the judgments such as to eradicate the risk of jigsaw identification. Given the high level of publicity the world over in respect of this case, to produce a judgment that gives rise to no risk of jigsaw identification would result in a judgment that could not even indicate the dates on which the proceedings were heard. Within this context, and in the very particular circumstances of this case, I accept Mr. Wolanksi's submission that in light of the level of information already in the public domain concerning this case, it is unrealistic to think

that the judgments given by this court could be anonymised to the extent required to ensure the parties were not identified whilst at the same time remaining a means by which what the court has done in this case can be understood by the public at large.

79. In these circumstances, I am satisfied that the choice for the court is to publish the judgments without anonymisation or not to publish them at all.

80. Dealing first with the importance of, and the justifications for interfering with the Art 8 right of Rocco and his parents for respect for private and family life, I of course bear in mind that the ambit of their private life is a wide one, encompassing not only the narrow concept of personal freedom from intrusion but also psychological and physical integrity, personal development and the development of social relationships and physical and social identity. I further bear in mind that the publication of my judgments without anonymisation would plainly constitute an interference with that right.

81. The justifications advanced for the interference in the Art 8 rights engaged in this case are the strong public interest in maintaining the principle of open justice and the public interest in society at large being able to understand the work of the family courts.

82. In addition I must, by virtue of s 12(4) of the Human Rights Act 1998, have particular regard to the importance of the Convention right to freedom of expression more widely. As I observed in *H v A (No 2)*, within this context it is important to remember that the right to freedom of expression is as important for the children who are the subject of proceedings before the family court as for the adult parties and the press. It is of manifest benefit to all children that the fundamental rights and freedoms that undergird the society in which they grow up and in which they will assume their place as adults are maintained effectively. It is likewise of manifest benefit to all children that proceedings which determine their future welfare are subject to the safeguards conferred by the principle of open justice.

83. I must also have regard in this case to the fact that (subject to a limited number of redactions to each judgment that I intend to make prior to publication) *all* of the information set out in my two judgments is already in the public domain. By virtue of s 12(4)(a)(i) of the Human Rights Act 1998 I must, in circumstances where the proceedings relate to material which appears to be journalistic, have regard to the extent to which the material has become available to the public. In this case, the material set out in my judgment is already in the public domain and widely available to the public on the Internet. Indeed, compared to that which has already been, and which continues to be, reported, Mr. Setright accurately describes my recitation in each judgment of the factual background to this matter as "anodyne". Within this context, the information already in the public domain goes far further than anything that will be said in my judgments in this matter, limited as they are to matters of case management and procedure. In particular, the judgments do not contain the details of the dispute between the parties beyond a description of the proceedings between the parties to date, the issues that arise for determination in these proceedings and their respective positions on those issues.

84. Turning to the importance of, and the justifications for interfering with the Art 10 right to freedom of expression in this case, the right to freedom of expression has been

described as the "*touchstone of all human rights*" (UN General Assembly Resolution 59(1) of 14 December 1946). The importance of the Art 10 right to freedom of expression has been articulated fully by the domestic courts (see for example *R v Legal Aid Board ex parte Kaim Todner (A Firm)* [1999] QB 966 at 977 and *R v Secretary of State for the Home Department ex parte Simms and Another* [2000] 2 AC 115 at 126). It is plain that a decision not to publish my judgments or to publish them and restrict the manner in which they can be reported by making a reporting restriction order would constitute an interference with the Art 10 right to freedom of expression.

85. The justifications advanced for that interference in the Art 10 right engaged in this case centre on the impact on Rocco of the publication versions of the judgments without anonymisation. As I have already recounted, the law is clear that in each case the impact on the child of publication must be assessed by reference to the evidence before the court rather than by reference to a presumption that publicity will be inevitably harmful to the child. As noted above, I accept that Rocco in particular may find further publicity as uncomfortable as he has found the publicity that has taken place to date. There is however, no evidence before the court that such publicity will be harmful to him. No further justifications for interfering with the Art 10 right to freedom of expression are advanced by the parties.

86. Applying the “ultimate balancing test” of proportionality in the circumstances of this case I am satisfied that in the circumstances that I have set out above, the proportionate approach in this case is to permit the publication of my two judgments without anonymisation, subject to the redaction of certain sensitive matters and the continued application to those published judgments of the reporting restriction order I made at the conclusion of the hearing and I so direct.

87. Finally on this issue, it can properly be said that unprecedented cases may make for poor precedent. I make clear that my decision to publish my judgments without anonymisation is based on the highly specific, and indeed quite exceptional facts of this case, most particularly the extraordinary amount of information already in the public domain worldwide concerning these matters.

Conclusion

88. Accordingly, I give permission to the mother to withdraw her proceedings under the 1980 Hague Convention. Rocco’s passport will be released to him for the purposes of travel at Easter. Upon his return to this jurisdiction, and if agreed, the passport should be held by Rocco’s solicitors. If this is not agreed, then, as I say, I see no principled reason why Rocco should not retain his own passport pending determination of any issue regarding the same by the New York court. I direct that any future applications made in this jurisdiction shall be reserved to me. I direct that my judgment of 3 February 2016 following the hearing on 21 December 2015 and this judgment be published on the terms which I have set out above. The reporting restrictions in this case will continue to be provided by the order that I have already made and will apply to the reporting of my published judgments. I make clear that I have made no orders concerning the question of whether or not Rocco returns to New York, nor do I express any views on that question.

89. Finally, I would say this. For all the interesting legal argument and great learning that is apparent from the admirable skeleton arguments and submissions of leading and junior counsel, at the root of these proceedings (and, I venture to add, the proceedings in the United States) is a temporary breakdown in trust. For all the media coverage, comment and analysis, this is a case born out of circumstances that arise for countless separated parents the world over.

90. The court should always be the option of very last resort when parents cannot agree matters in respect of their children. Whilst the law provides a mechanism for the resolution of disputes between parents in respect of their children it is but a blunt instrument when compared to the nuanced virtues of calm discussion and considered compromise between those involved, accepting that this latter path can be a hard one on which to embark, and to sustain, in the context of relationship breakdown. It is for this reason that during the course of the proceedings on each side of the Atlantic Judge Kaplan and myself have repeatedly urged the parties to adopt a consensual approach to resolving the matters of dispute between them for the benefit of Rocco.

91. Within this context I renew, one final time, my plea for the parents to seek, and to find an amicable resolution to the dispute between them. Because agreement is not possible today does not mean that agreement will not be possible tomorrow. Most importantly, as I observed during the course of the hearing, summer does not last forever. The boy very quickly becomes the man. It would be a very great tragedy for Rocco if any more of the precious and fast receding days of his childhood were to be taken up by this dispute. Far better for each of his parents to spend that time enjoying, in turn, the company of the mature, articulate and reflective young man who is their son and who is a very great credit to them both.

92. That is my judgment.