



Neutral Citation Number: [2021] EWCA Civ 194

Case No: B4/2020/2010

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY DIVISION
OF THE HIGH COURT OF JUSTICE
MR L SAMUELS QC SITTING AS A
DEPUTY HIGH COURT JUDGE
FD20P00376

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2021

Before:

LORD JUSTICE MOYLAN
LADY JUSTICE ASPLIN
and
MR JUSTICE HAYDEN

Re: A (A Child) (1980 Hague Convention: Set Aside)

Mr C Hames QC and Ms I Kumar (instructed by Lyons Davidson Solicitors) for the
Appellant Father
Mr T Gupta QC and Mr R Powell (instructed by Tilly Bailey and Irvine LLP) for the
Respondent Mother
Ms J Renton (instructed by Freemans Solicitors) for the Child

Hearing date: 2nd February 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am 23rd February 2021.

Mr Justice Hayden:

1. This is an appeal from an order made by Mr Leslie Samuels QC, sitting as a Deputy High Court judge, on 20th November 2020. The judge set aside a return order made by Ms Deidre Fottrell QC, also sitting as a Deputy High Court judge, on 29th September 2020 and dismissed the father's application for a summary return order to Italy, under the Child Abduction and Custody Act 1985, incorporating the 1980 Hague Convention on the Civil Aspects of International Child Abduction. On 18th December 2020, permission to appeal was granted by Moylan LJ, who was satisfied that the grounds for appeal established sufficient prospect of success, "*particularly in respect of the judge's decision to set aside the previous return order and his decision to dismiss the father's application under the 1980 Convention.*"
2. Following the grant of permission to appeal, an application was made on behalf the child (A), the subject of these proceedings, to be joined as a party. The application was made by, and supported by a statement from, solicitors instructed directly by A. Moylan LJ directed that the application was to be listed for determination with this appeal and gave permission for written and oral submissions to be made on behalf of A both in respect of the application to be joined and in respect of the substantive appeal.

Background

3. A was born in England in 2008 and is now aged 12. His mother (M), a British national, met his father (F), an Italian national, in Italy in 2005. The couple moved to England for a brief period before A's birth but, shortly afterwards, in 2008, travelled back to Italy where they lived as a family.
4. F was not named as A's father on the birth certificate when A's birth was registered in England. A few months after arriving in Italy, the parents attended the office of the local Municipality and signed a declaration recognising F's paternity. A grew up in Italy with his parents. He attended nursery and primary school there. A and his mother travelled regularly to England to visit his maternal grandparents and extended family. On 27th June 2019, when A was 10, M brought him to England. F says that there was an understanding that they would both return by mid-August, although no precise date had been set.
5. Over the summer of 2019, M decided that she would remain in England with A. F travelled to this jurisdiction to try and talk with M about their situation. There were two visits, the first between 15th and 29th August 2019, the second between the 3rd and 10th September 2019. On this second visit F discovered that A had been enrolled in school in England.
6. In February 2020 F collected A and took him to Italy for the half term break. A further trip was planned for 5th April 2020. Though M had provided her consent to this trip, it was withdrawn and an ex-parte application made to prevent F removing A from the jurisdiction. F, who had travelled to England, returned to Italy and, shortly afterwards initiated proceedings under the Hague Convention by signing an application to the Italian Central Authority for the return of A.

The 1980 Hague Convention proceedings

7. On 24th June 2020, F's application, pursuant to the 1980 Convention was issued in this jurisdiction in the High Court. M resisted the application and indicated that, in the event of A's return being ordered, she would not return with him. She contended that F did not have rights of custody, and/or that he had acquiesced, such that Article 13(a) was engaged. Further, M stated that A would be at grave risk of harm, and, alternatively or additionally, placed in an intolerable situation if he were returned to Italy, such that Article 13(b) would be engaged.

The first CAFCASS report of Ms Roddy

8. On 8th July 2020, Roberts J directed CAFCASS to prepare a report addressing: A's wishes and feelings in respect of a return to Italy; his level of maturity; whether he should be separately represented in the proceedings and whether he wished to meet with the judge.
9. On 10th September 2020, A met with Family Court Adviser Ms Jacqueline Roddy for 75 minutes. It was possible to arrange a face to face visit on this occasion. In her report, dated 11th September 2020, Ms Roddy explained that A "*spoke positively both about his life in England, and of his life in Italy*". When pressed on how he felt about the prospect of a return to Italy, A said that he did not know. Ms Roddy reports:

"Despite my efforts – sensitive to the predicament [A] finds himself in – he was not willing or able to express a view in respect of a return to Italy beyond what he repeatedly told me was his unease at being caught in a quandary – and either option represents a significant loss for him... [A] wants the judge to know that he doesn't want to get involved in any sense of decision making; doesn't feel strongly about either option, but wherever he lives he wants to see the other parent."

10. Ms Roddy observed that it was unusual, in her experience of these cases, for a child to resist being drawn on expressing a preference. She emphasised, however, that she was "*confident*" that the child's responses were, in her assessment, entirely authentic and had not been influenced by either parent. Ms Roddy described A as "*an able, bright child*" who gave a reasonable account of his life and views. Accordingly, Ms Roddy did not consider that joining A as a party to the proceedings was necessary. Further, in light of A's resistance to becoming embroiled in his parents' dispute, she considered joining him as a party would be inappropriate. A did not wish to write to the judge directly, having been satisfied that his views would be communicated through the CAFCASS report.

The judgment and return order, September 2020

11. On 28th September 2020, the application for summary return was heard before Ms Deidre Fottrell QC. On 29th September 2020, A's summary return to Italy, by 11:59pm on 30th October 2020, was ordered. In her judgment, dated 8th October 2020, Ms Fottrell found, having accepted the expert evidence of an Italian lawyer, that F has rights of custody for the purpose of Article 3.

12. Ms Fottrell was satisfied that M's defence, under Article 13(a), was not made out. M accepted that F did not know of her plans to remain in England when she brought A to this country in 2019. The available evidence demonstrated it was clear F wished for M to return with A to Italy. It was found that from July 2019 to April 2020, F was trying to reconcile with M, and then later focused his efforts on persuading her to return with A to Italy, or to allow A to come back to Italy with him. Further, F simply did not know about the 1980 Convention process and had not been advised he could make an application for the return of the child until April 2020. Mr Gupta QC, who resists the appeal on behalf of M, has endeavoured, rather ambitiously, to revisit the issue of acquiescence at this hearing but the argument is unsustainable in the light of these facts.
13. Similarly, Ms Fottrell was not persuaded that the high bar set in Article 13(b) was satisfied in this case. She noted that M's submissions on this issue were brief and mainly focused on her concern that F could not properly care for A, highlighting that this was a welfare issue which fell outside the remit of the 1980 Convention. Further, the CAFCASS report did not, the judge considered, reflect a child who had internalised his abuse by F, as was submitted on behalf of M.
14. Accordingly, F's application for summary return was granted. Consequential directions were made for F to collect A on a date to be agreed in the week commencing 23rd October 2020, so that they could return together to Italy.

Events following the return order of September 2020

15. M was manifestly distressed by the court's decision to order A's return to Italy. On 30th September 2020 (i.e. the day after the order was made), M contacted Ms Roddy to express her unhappiness with and surprise at the decision. It appeared that M simply had not really contemplated losing care of A. M also explained that she had contacted her local children's department in an attempt to avoid having to comply with the return order. M expressed to Ms Roddy a concern that A had been reluctant to discuss negative aspects of his relationship with F and had not fully appreciated that a return to Italy would involve returning without M. Ms Roddy explained that the involvement of CAFCASS had ended and advised her to speak with her legal team.
16. F arrived in England on 17th October 2020. M said that A was shocked when he learned of the decision of the court and had spoken to her every day about not wanting to return to Italy. In her statement, she exhibited a note from the School Safeguarding Officer and a handwritten note from A. In the note, A says he would like more time to think about things, as he was not sure he wants to leave his school and start at another one. He says "*I didn't want to choose between them as I love them both. But I would be happy if you would please let me stay here with my mum*". The exhibited note from the School Safeguarding Officer describes A "*requesting more time to consider his options*". M had not informed the school that a decision had already been taken by the court.
17. F stated that he believed M embarked on a campaign since the making of the return order to try and do everything she could to undermine it. He relied on written messages from M sent to him on 16th October 2020, threatening further to involve A if he did not give A 'more time' to make a decision about returning to Italy. Similarly, he said M posted the outcome of the proceedings on social media and asked her friends for advice

about resisting the order. F did not believe that A truly objected to the return but considered he had been manipulated by M.

The application to set aside the return order

18. On 27th October 2020, M applied to stay the return order, alleging that there had been a change of circumstances since it was made, because A had expressed a clear objection to returning to Italy. The following day, Mostyn J stayed the return order to enable CAFCASS to conduct a further interview with A and establish if his reported objection was genuine.

The second CAFCASS report of Ms Roddy

19. Due to the restrictions, consequent upon the public health pandemic, it was necessary for Ms Roddy to speak with A via a video call. This took place on 30th October 2020, and Ms Roddy finalised her second CAFCASS report on 3rd November 2020. In her report she observed:

“Once the court made the decision that he should return, he was clear that he felt he needed more time to think about it (apparently completely of the view that he could ‘decide’ whether to comply or not with the court’s order). Over the last weeks he has been thinking; balancing the options, and gradually reached the position that he wishes to remain in the UK. When pressed, he conceded that his father arriving in the UK to accompany him back to Italy effectively crystallised his wish to remain here.”

20. Ms Roddy explained that, despite her efforts to disabuse him, A retained a sense that it was his choice and responsibility to decide whether to return to Italy. She considered A clearly struggled with the responsibility and pressure that brought. She said that while it was unlikely that M would see her actions as overtly influencing her son, he had been affected by the experience of living with M’s distress for the last month, and her urgent efforts to thwart the court’s order. This, to my mind, is a benevolent interpretation.
21. Though this is not highlighted in the judgment of Mr Samuels, it is important to note that A told Ms Roddy that over the last weeks he had been thinking; balancing the options and had gradually reached the position that he wished to remain in the United Kingdom. He talked of having *“had some time to think about it”*. He spoke of how he had felt *“a bit sad”* at the prospect of leaving the UK on hearing of the court’s decision. He also said that if the court had decided that he should remain in the UK, that too would have made him feel *“sad a bit as well”*. A told Ms Roddy that he knew M was upset on learning that he was to return to Italy *“because she told [him]”*. The entire tenor of A’s account reflects his real sense of conflict. It most certainly does not reveal a young man who has wanted, throughout this investigation, to stay in the United Kingdom but has felt inhibited from expressing himself openly to the CAFCASS officer. This is M’s case and it has no evidential foundation. On the contrary, what is clear is A’s real sense of what Miss Roddy calls his *“uncomfortable burden to carry.”*
22. It is also important to record that in relation to a move to Italy and, even in this October interview, A said *“I don’t want to go but if I have to, have to – and I don’t want to go*

– *if I have to I will go, but don't really want to.*” In two letters to the judge, sent only days apart, A expressed very different strengths of feeling.

23. Ms Roddy concluded that *“it appears that he has reached a view that on balance he wishes to remain living in the UK with his mother. His views as expressed to the judge, through me, just about constitute an Objection to a return...”*. Ms Roddy has, in her report, managed to convey both A's ‘wishes’ and his ‘feelings’. She has not, as an experienced CAFCASS officer, elided the two, recognising that they are different concepts. A child's feelings are frequently gauged not by what he says but by what he does not say. This thoughtful and reflective report captures both. It is carefully and sensitively written.

The judgment of November 2020

24. The judge heard oral evidence and submissions on 5th and 6th November 2020 and handed down a written judgment on 20th November 2020. The judge refused M's application for A to be joined as a party to the proceedings and for a guardian to be appointed to represent him. Applying Rule 16.2 of the Family Proceedings Rules 2010 (“the FPR”), he concluded that it was not in A's best interests to be joined because *“joinder would pull A further into this process, and the perceived need to choose between his parents”*. The judge noted that Ms Roddy had confirmed in evidence that she did not recommend joining A as a party. The judge concluded that it was neither necessary, proportionate nor in his best interests to be joined as a separate party. His wishes and feelings had been fully set out in the two CAFCASS reports already before the court, and there were *“no complex legal issues that require separate representation”*.
25. In relation to the application to set aside the return order, the judge identified the four-stage process set out in **Re B (A Child) (Abduction: Article 13(b)) [2020] EWCA Civ 1057, [2021] 1 WLR 517 (“Re B”)** at paragraph 89 (see below).
26. Referring to paragraph 90 of **Re B**, which clarifies that it may be possible for all four stages to be addressed at one hearing when the developments or changes relied upon are clear and already supported by evidence, the judge concluded that the present case *“might be one of the situations canvassed”* where it would be appropriate to do so.
27. The judge sets out his reasoning thus:

“63. The issue of the child's objections was not before the court at the hearing before Ms Fottrell QC. The reason for this is obvious in that A had not at that stage expressed any objection to return. He told Ms Roddy that he did not want to get involved in the decision making and had no strong views about either option. For the reasons I have set out (and will consider further below) Ms Roddy concludes that he had now expressed a view that does “just about” amount to an objection.

64. I am acutely aware both of the ‘high threshold’ for such set aside applications and the risk of a parent (in this case the mother) deliberately seeking to frustrate the court's previous determination by taking steps designed to create an alleged

change of circumstances. However, in my view, A's wishes and feelings, as expressed to Ms Roddy, does provide new information that fundamentally changes the basis of the order made by Ms Fottrell QC on 29 September 2020. Although the father alleges manipulation, unsurprisingly, the situation is more complex than that, as analysed by Ms Roddy in her evidence. That situation merits, in my judgment, a more sophisticated evaluation. Accordingly, I have reached a decision that I should permit a reconsideration of the merits of the father's application for summary return, limited to the defence now raised and pursued of A's objections."

28. The judge concluded at paragraph 79 of his judgment that the evidence of A's wishes and feelings amounted to "a fundamental change of circumstances" and "a fundamental change to the basis on which the previous order was made". He noted that the previous judgment had centred on issues of rights of custody, acquiescence and intolerability, but that: "*[this] hearing had an entirely different focus. The evidence plainly requires consideration and determination...*".
29. The judge proceeded to consider the three 'limbs' of the child's objections defence, namely: that the child objects to being returned; that the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views; and whether or not to order a summary return: **Re M (Abduction: Child's Objections) [2007] EWCA Civ 260, [2007] 2 FLR 72.**
30. Noting the "*considerable dispute between the parents*", the judge found that it was "*abundantly clear*" that since the making of the return order on 29th September 2020:

"A has been under a considerable degree of emotional pressure. He has been made to feel responsible for making a choice and is aware of the distress that such a choice will cause to one or other of his parents."

He placed significant weight on Ms Roddy's observation that:

"[A's] views as expressed to the judge, through me, just about constitute an Objection to a return."

31. It is important to highlight that Ms Roddy also signalled (in the following and final sentence in her report) that it was for the court: "***to determine whether that constitutes a fundamental change of circumstances***" (my emphasis).
32. The judge records what A told Ms Roddy i.e.:

"that he wants to stay in the UK, that he really does not want to leave here. He was able to give her clear reasons for expressing that wish, namely that he would miss his mother and his maternal family and that he was worried about having to start a new school in Italy. He was able to explain that it was when his father arrived in England to take him back to Italy that effectively crystallised his position into one of objection to return. He told

her and has repeated in a letter to me through her, that he does not want to go and wants to stay here if he can.”

33. Whilst this is all broadly factually accurate, it requires to be balanced against the judge’s own clear findings that M had placed an emotional burden on A and “*developed a narrative with A that he now needed to decide what he wanted to do*” The judge also expressly agreed with Ms Roddy that “*A had been pushed into a corner so that he had to express a preference despite his clearly expressed indication that this was the opposite of the position he wanted to be in*”. At paragraph 90 of his judgment the judge makes the following observation:

“I bear in mind in this context the dicta of Baroness Hale in Re M and the need to consider whether a child’s objection is authentically his own or the product of influence of the abducting parent. There is at least an element of influence in this case, although the overall picture is more complex than that.”

34. Though the judge clearly identifies a significant and sustained degree of pressure placed on A by his mother, he did not appear to consider that this compromised the authenticity of A’s expressed views. Having identified “*a more complex*” picture, the judge elucidates how he perceived that complexity, in these terms:

“It is tempting in these circumstances to seek to ‘punish’ the mother for the emotional burden she has placed on [A] and her inability to accept the decision on 29 September and to prepare [A] as had been anticipated for his move back to Italy. Equally, it is tempting to seek to ‘reward’ the father for his ability to empower [A] to express his own wishes and feelings and the strong emotional reassurance that he has been able to give [A] that their relationship will endure, will remain strong and that he will love and be there for [A] whatever the outcome of these proceedings. However, I have to stand back from such temptations and exercise my discretion in light of all the factors in this case.”

35. Mr Hames QC, on behalf of the appellant father, submits:

“All of these factors in combination, as clearly set out during Ms Roddy’s oral evidence and in her reports, should have made the learned deputy judge far more astute to examine that the mother had influenced the child to ‘create’ a last-ditch ‘defence’ to the summary return order.

A comparison and analysis of the views expressed by the child to Ms Roddy, just 6 weeks apart, amply demonstrate that there had been no ‘fundamental change of circumstances’ but rather circumstances were created by the mother to encourage [A] to make a ‘decision’ which had already been made. There was no such detailed comparison of the two views within the judgment.”

Determination

36. I propose, first, to address the application made by Ms Renton for A to be joined as a party to this appeal. F opposes that application. It is supported by M.
37. The legal framework is uncontroversial. In **Re M (Children) (Republic of Ireland) (Child's Objections) (Joinder of children as parties to appeal) [2015] EWCA Civ 26, [2016] Fam 1**, Black LJ, as she then was, provided helpful guidance in respect of joinder of a child to an appeal where the child had not been a party in the court below:

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

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

"19.1 Any number of claimants or defendants may be joined as parties to a claim.

19.2 (1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period).

(2) The court may order a person to be added as a new party if –

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

(3) The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings.

(4) The court may order a new party to be substituted for an existing one if –

(a) the existing party's interest or liability has passed to the new party; and

(b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings."

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

"(d) 'appellant' means a person who brings or seeks to bring an appeal;

(e) 'respondent' means –

(i) a person other than the appellant who was a party to the proceedings in the lower court and who is affected by the appeal; and

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

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

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

151. Part 21 CPR deals with children and protected parties. A 'child' means a person under 18 years of age (Rule 21.1(2)(b)). Rule 21.2(2) provides that a child must have a litigation friend to conduct proceedings on his behalf unless the court makes an order under Rule 21.2(3) permitting the child to conduct the proceedings without. Rule 21.2(4) provides that an application for an order under Rule 21.2(3) can be made by the child. If the

child already has a litigation friend, it must be made on notice to the litigation friend but may otherwise be made without notice. The court may appoint a litigation friend by order (Rule 21.6). Alternatively, Rules 21.4 and 21.5 deal with becoming a litigation friend without an order.”

38. In **Re P (Abduction: Child’s Objections) [2020] EWCA Civ 260**, Moylan LJ linked the observations above with the President’s Guidance on Case Management and Mediation of International Child Abduction Proceedings, 13th March 2018 and concluded:

“48. It is clear from the above authorities that it will only rarely be in a child's best interests to be joined as a party to proceedings under the 1980 Convention. When the relevant issue is a child's objections, this is because the child's views and interests will, typically, "be properly presented to the court" through evidence from a Cafcass officer and through the legal arguments being advanced on behalf of the parents and addressed by the court.”

39. Applying the above framework to the facts of this case produces a clear answer. Ms Roddy’s reports set out a careful analysis and contain a skilful evaluation of both A’s wishes and his feelings (see below). It is Ms Roddy’s reports that have brought A’s voice into the court room. The most prominent and consistent response in both interviews has been A’s forceful and determined resistance to being required to express his own view as to where he should live. What is also abundantly clear is that this mature young man loves both his parents equally. A is sending an entirely clear message that he does not want to be drawn into the conflict between his parents.
40. Were A to be joined as a party, his lawyers would no doubt advance his wishes and his instructions to the court. They are, however, less well placed to understand and articulate A’s feelings. In this respect the CAF/CASS Officer holds the appropriate skills and, in deploying them, ensures that A’s wishes are most effectively conveyed to the court. Moreover, it is clear that A has been placed under considerable emotional pressure to express the preference M desires. Accordingly, there is a real danger that A’s instructions to his legal team may not reflect his own authentic voice. In such circumstances and as plainly contemplated by Moylan LJ in **Re P** (supra), joining A as a party would not merely fail to serve his best interests but would actively be contrary to his welfare. To join A as a party would only serve to heighten the conflict that he has struggled to avoid.
41. Accordingly, in my view, it is clear that the application made on his behalf should be refused. Before leaving this issue, I would want to make clear, in particular to A, that this decision is not because his views and interests are not important; it is because his views and interests have been very fully provided to the court through the evidence of Ms Roddy and through the submissions made by each of the parents. We have, of course, heard and taken fully into account all the points made on his behalf by Ms Renton but they did not raise any point or issue which was not raised either through the evidence, in particular of Ms Roddy, or in the other submissions.

42. The legal framework is to be found in the FPR rule 12.52A and the amended Practice Direction PD12F 4.1A, which confirm the authority of the High Court to set aside its own orders in Hague Convention proceedings:

“Application to set aside a return order under the 1980 Hague Convention

12.52A - (1) In this rule—

“return order” means an order for the return or non-return of a child made under the 1980 Hague Convention and includes a consent order;

“set aside” means to set aside a return order pursuant to section 17(2) of the Senior Courts Act 1981 and this rule.

(2) A party may apply under this rule to set aside a return order where no error of the court is alleged.

(3) An application under this rule must be made within the proceedings in which the return order was made.

(4) An application under this rule must be made in accordance with the Part 18 procedure, subject to the modifications contained in this rule.

(5) Where the court decides to set aside a return order, it shall give directions for a rehearing or make such other orders as may be appropriate to dispose of the application.

(6) This rule is without prejudice to any power the High Court has to vary, revoke, discharge or set aside other orders, declarations or judgments which are not specified in this rule and where no error of the court is alleged.”.

43. The relevant Practice Direction which deals with International Child Abduction, PD12F, was also amended and now includes the following:

“Challenging a return order or non-return order

4.1A

If you are a party to a return case and you believe that the court has made an error, it is possible to apply for permission to appeal (see Part 30 of the Rules and Practice Direction 30A).

In rare circumstances, the court might also 'set aside' its own order where it has not made an error but where new information comes to light which fundamentally changes the basis on which the order was made. The threshold for the court to set aside its decision is high, and evidence will be required – not just assertions or allegations.

If the return order or non-return order was made under the 1980 Hague Convention, the court might set aside its decision where there has been fraud, material non-disclosure or mistake (which all essentially mean that there was information that the court needed to know in order to make its decision, but was not told), or where there has been a fundamental change in circumstances which undermines the basis on which the order was made. If you have evidence of such circumstances and wish to apply to the court to set aside its decision, you should use the procedure in Part 18 of the Rules.

If the return order or non-return order was made under the inherent jurisdiction (see Part 3 of this Practice Direction), the court might set aside its decision for similar reasons as with return-non-return orders under the 1980 Hague Convention, but it also might set aside its decision because the welfare of the child or children requires it. If you have evidence of such circumstances and wish to apply to the court to set aside its decision, you should use the procedure in Part 18 of the Rules.

Any such application should be made promptly, and the court will also aim to deal with the application as expeditiously as possible.”

44. In **Re B**, *Moylan LJ*, at paragraph 81, referred to what he had said in **Re W (Abduction: Setting Aside Return Order)** [2019] 1 FLR 400, at paragraph 66:

“This power can be exercised when there has been a fundamental change of circumstances which undermines the basis on which the original order was made. I set the bar this high because, otherwise ... there would clearly be a risk of a party seeking to take advantage of any change of circumstances such as a simple change of mind.”

45. Recognising the danger that, were the bar to be set low, it might result in attempts to frustrate decisions, *Moylan LJ* signalled, in **Re B**, that the Court would be vigilant to prevent this.

“91. I would further emphasise that, because of the high threshold, the number of cases which merit any application to set aside are likely to be few in number. The court will clearly be astute to prevent what, in essence, are attempts to re-argue a case which has already been determined or attempts to frustrate the court's previous determination by taking steps designed to support or create an alleged change of circumstances.”

46. *Moylan LJ* also addressed the appropriate procedure to be applied when setting aside a return order. Drawing on the Court’s approach when considering the reopening of fact-finding hearings in Children Act proceedings, which he considered to be a helpful

analogy, Moylan LJ identified a structure to guide the court. It has been referred to both by Mr Hames and Mr Gupta, as the ‘four-stage test’. The process can be gleaned from **In Re Z (Children) (Care Proceedings: Review of Findings); Practice Note [2015] 1 WLR 95 and Re E (Children: Reopening Findings of Fact) [2020] 1 FLR 162**. It was identified by Moylan LJ as “*simply the structure of the process which I consider helpful*”. Though the test was not intended to be set in stone, the logic and structure of it is manifestly helpful:

“89. ...

(a) the court will first decide whether to permit any reconsideration;

(b) if it does, it will decide the extent of any further evidence;

(c) the court will next decide whether to set aside the existing order;

(d) if the order is set aside, the court will redetermine the substantive application.

90. Having regard to the need for applications under the 1980 Convention to be determined expeditiously, it is clearly important that the fact that there are a number of distinct issues which the court must resolve does not unduly prolong the process. Indeed, it may be possible, when the developments or changes relied upon are clear and already evidenced, for all four stages to be addressed at one hearing. More typically, I would expect there to be a preliminary hearing when the court decides the issues under (a) and (b), followed by a hearing at which it determines the issues under (c) and (d). These will, inevitably, be case management decisions tailored to the circumstances of the specific case.”

47. The judge’s approach, both to this test and to the high threshold required to establish a “fundamental change of circumstances”, has been subject to much scrutiny by the advocates. I can express my conclusions relatively shortly, as towards the end of the hearing it became clear to me that the appeal must be allowed. To my mind, both the approach the court should take and the threshold to be applied are entirely clear. Notwithstanding robust submissions to the contrary, I do not consider that the evidence in this case, as set out above, crossed the high bar, established both in the case law and fortified by the changes to the FPR. Indeed, I regard M’s application as a clear example of an attempt to reargue a case which had already been comprehensively determined. It is, in my view, precisely the kind of application which Moylan LJ was presaging in **Re B** (supra).
48. The 1980 Hague Child Abduction Convention is predicated on the principles of international comity and confidence. As such, it has created a summary jurisdiction intended to ensure that applications made pursuant to it are determined expeditiously. Intrinsic to the Convention is a recognition that delay in the legal process is likely to be inimical to the child’s welfare. Underpinning the philosophy of the Convention, is an

understanding that a speedy return of the child to his home country will, in principle, enable the child's future to be determined more effectively. The exception which arises in cases where a child objects to return is generated by two conditions: first, that the child himself objects to being returned and second, that he has attained an age and degree of maturity at which it is appropriate to have regard to his views. As is well established, this does not mean that the child's views are determinative, or even presumptively so. The court has a discretion which it will exercise, bearing in mind the nature and strength of the child's objections, particularly, the extent to which they are authentically his own and not merely reflective of the influence, intentional or otherwise, of the abducting parent. Thus, the Convention does not yield identical results in all cases. The central principles that I have mentioned have to be weighed alongside the facts which produce the exception and such pointers as there are which illuminate the welfare of the particular child. As Baroness Hale stated in **Re M (Abduction: Rights of Custody) [2007] UKHL 55, [2007] 3 WLR 975, at paragraph 48:**

“The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction. Further elaboration with additional tests and checklists is not required.”

It is for all these reasons that the test as to whether there has been a ‘fundamental change of circumstances’ requires to be set high. Were it to be otherwise it would corrode the central philosophy of the Convention.

49. Ms Roddy was clear, in her first report, that A did not want to express a view about, let alone decide, where or with which parent he should live. In her second report, Ms Roddy “*just about*” came to the view that A was objecting to return. Even in this second report, A's views cannot, when taken at their highest, be construed as expressing an enthusiastic or unambiguous wish to stay in the UK. His remarks remain fretted with ambivalence. Contrary to the case advanced on M's behalf, by Mr Gupta, A told Ms Roddy that he had still not decided where he wanted to live as recently as “*about a week ago*”. This was certainly not a case of long held views being misunderstood or misrepresented, which I understand M's case to have been. As I have noted above, Ms Roddy was, very properly, at pains to emphasise that whether the evidence amounted to a ‘fundamental change’ was not an issue on which she was expressing a view. She considered that this was a matter for the Court; I agree.
50. A is described as a “*lovely young man*”. In my view, he has found himself being placed, or even pushed, both forward and centre in a dispute that is not of his making and which he has consistently indicated that he wishes his parents and/or the Court to resolve. It strikes me that had the judge followed the force of his own analysis of the evidence, he would have been bound to conclude that this was not, when properly balanced, an objection to return, or at very least not one expressed in A's own autonomous and authentic voice. Manifestly, as the judge identified, A's expressed view, expressed in Ms Roddy's assessment “*on balance*”, required to be considered in the context of the “*considerable degree of emotional pressure*” he had been under since 29 September derived from M's response to the order. In any event, and even if this were to be regarded as ‘*just about*’ an Objection, the evolution of the welfare investigation, set out in Ms Roddy's two reports, clearly identified A's views as remaining either ambivalent or, at very least, not strongly held. In those circumstances, the preponderant evidence

pointed to exercising the Court's discretion in favour of return. It follows, axiomatically, that the evidence does not surmount the high test required to establish 'fundamental change'; indeed, in my view, the circumstances of this case are some distance removed from that. I note the judge's observation:

"I start from the basis that [A's] country of habitual residence is Italy and that he spent almost his whole life there up until June 2019. The Convention policy considerations in this case weigh firmly in favour of a return to his country of habitual residence and determination of the welfare issues by the courts of that country."

51. The judge identified the ambit of his discretion in these terms:

"The gateway having been established, I must then exercise my discretion whether or not to order a summary return. I remind myself that a child's views are not determinative or presumptively so. Indeed, on the facts of this case I must consider very carefully what weight to give them. I must balance his views against other welfare considerations and the more general Convention policy objectives. All this within the constraints of the summary process and the limited purpose of the exercise."

That test, as the judge summarises it, in the circumstances of this case required far greater weight to be attributed to the general Convention policy objectives that he noted *"weigh firmly in favour of [A's] return to his country of habitual residence..."*

52. For all the above reasons, in my view, this appeal must be allowed and an order made for A's return to Italy.

53. Finally, I would want to repeat and make clear to A that, although we have refused the application that he be joined as a party, his interests are at the very centre of these proceedings. We would also want to make clear that it is the court which has the responsibility for making the decision in this case. It is, and never has been, A's responsibility to make a choice or to decide. This court has carefully listened to all the points made to us including those made by Ms Renton on his behalf. We have, of course, also carefully considered all the evidence including that provided by Ms Roddy which includes everything he has said. We also have to consider the legal principles which apply to these proceedings. Having considered the points made to us, the evidence and those legal principles we have reached the clear answer as to what order we should make.

LADY JUSTICE ASPLIN:

54. I agree.

LORD JUSTICE MOYLAN:

55. I also agree.