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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
SIR JONATHAN COHEN
ZC20P01401

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 August 2022

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE WILLIAM DAVIS

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Re:- X (Children)

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Will Tyler QC and Edward Devereux QC (instructed by **Vaitilingam Kay Solicitors**) for the **Appellant/First Respondent Father**
Teertha Gupta QC, Jacqueline Renton and Helen Williams (instructed by **Family Law in Partnership**) for the **First Respondent/Appellant Mother**
Christopher Hames QC and **Clarissa Wigoder** (instructed by **Freemans Solicitors**) for the **Second Respondent**

Hearing date: 26 July 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 19th August 2022.

Lord Justice Moylan:

1. This judgment deals with two separate matters. It addresses, first, the father's and the mother's appeals from orders made by Sir Jonathan Cohen ("the judge") on 13 May 2022 in the course of long-running proceedings concerning the parties' children, P, aged 16 and T, aged 5. I gave permission to appeal in respect of both appeals.

2. Secondly, it addresses, briefly at the end, an application for permission to appeal from an order made by the judge on 10 June 2022 refusing the father's application for, the equivalent of, a legal services payment order in respect of the children proceedings. I listed the application for permission to appeal, with the appeal to follow, at the conclusion of the hearing of the above appeals.

3. As to the appeals from the order of 13 May 2022, the father appeals from the summary dismissal of three applications dated 12 May 2022: (i) for a stay of the order made by the judge on 28 April 2022 by which he had provided for T's passports to be released to the mother on certain recitals/agreements; (ii) to set aside the order made by the judge on 12 January 2022 by which he recognised a parental responsibility order made by a court in Russia on 18 March 2021; and (iii) for substantive child arrangement orders, including a prohibited steps order, under the Children Act 1989 ("the CA 1989") in respect of T.

4. The father also appealed from, and sought a stay of, the provision in the order of 13 May 2022 which authorised the mother's solicitors to release T's passport (which they were holding pursuant to an earlier order) to the mother as from 11.30am on 18 May 2022. By my order, dated 17 May 2022, I stayed that provision "with the effect that the mother's solicitors must continue to hold the child's … passports". Despite that order, of which she was aware, the mother travelled to Russia with T on the afternoon of 18 May 2022, having obtained alternative travel documents from the Russian Embassy, and has remained there since then.

5. The father advances two grounds of appeal, namely: (1) that the judge was wrong summarily to dismiss his applications at the first directions hearing; and (2) that the judge was wrong to determine that the applications "did not add anything new to what (the judge) had considered previously"; in other words, that the judge was wrong to determine that the applications were without sufficient merit to justify their continuation.

6. The mother appeals the provisions in the 13 May 2022 order: (a) that, in the event of the parents being unable to agree, the judge would determine on written submissions what contact should take place between the father and T in June and July 2022; and (b) that, for the purposes of contact, the mother must return T to England by no later than 15 June 2022 where T was required to remain until at least 25 June 2022.

7. The mother contends that the judge had no jurisdiction to make the orders which he did.

8. The father is represented by Mr Tyler QC and Mr Devereux QC (the latter appeared at the hearing on 13 May 2022). The mother is represented by Mr Gupta QC (who also appeared at the hearing on 13 May 2022), Ms Renton and Ms Williams (who appeared at the hearing on 10 June 2022). The child, P, is represented, for the

purposes only of the appeals from the order of 13 May 2022, by Mr Hames QC and Ms Wigoder. The child was not represented at the hearing on 13 May and had not been served with the applications.

9. At the outset of the hearing, the court sought clarification from Mr Hames as to whether it was necessary for his client to be represented for the purposes of this appeal. We sought this clarification because it did not appear to us that she had any distinct interest in the outcome of the appeal or certainly none which required her representation at this hearing. However, Mr Hames indicated that he was instructed to appear largely it seemed because of P's concerns about her family's welfare in which she was "intrinsically involved". In due course we heard oral submissions from Mr Hames which, with his written submissions, confirmed my initial view that P need not have been represented at this hearing and, indeed, may have become overly involved in the proceedings.

10. This is the second time this case has been to the Court of Appeal. The previous decision, which dealt purely with an issue of law, is reported as: *Re X (Children) (Article 61 BIIa)* [2022] 1 FLR 301.

11. At the end of the hearing, we informed the parties that their respective appeals from the order of 13 May 2022 would be dismissed. I set out below my reasons for agreeing with that decision.

Background

12. I propose to set out only a very short summary of the background history starting in 2020.

13. The father began divorce proceedings in England on 21 September 2020. This led to the mother bringing divorce proceedings in Russia on 13 October 2020. As noted by Thorpe LJ in *Golubovich v Golubovich* [2011] Fam 88, at [93], in respect of competing divorce proceedings: "As a generalisation it is only the rich who fight to establish priority. There is no incentive to fight but financial advantage". I would add the word "perceived" before "financial advantage" because, although the wife ultimately obtained a divorce in Russia, this inevitably led to the husband being given leave to make a financial application under Part III of the Matrimonial and Family Proceedings Act 1984. I would also note that the wife obtained the divorce in Russia despite the English court having made an order prohibiting her from taking any further steps in those proceedings and requiring her to seek a stay.

14. There were also competing parental responsibility proceedings. The father commenced proceedings in England for orders under the CA 1989 on 9 November 2020. The mother issued applications in Russia on 28 October 2020, 13 November 2020 and 24 November 2020. The mother issued more than one application because her first application was, at least initially, rejected on the basis that the court was not satisfied that it had jurisdiction. What happened procedurally in respect of the mother's proceedings in Russia was in dispute between the parties.

15. On 1 March 2021, Nicholas Cusworth QC, sitting as a deputy High Court judge, decided, in essence, that the father's application under the CA 1989 was governed by the 1996 Hague Child Protection Convention so that, if the Russian court accepted

parental responsibility jurisdiction, the lis pendens provisions (Article 13) of that Convention would require the English court to stay the father's application. That decision was overturned, in the judgment referred to above, because, at [92]:

> "If the children were habitually resident in England and Wales when the English proceedings commenced, BIIa applies to them, including the jurisdiction provisions, and Art 13 of the 1996 Hague Convention does not apply."

16. The Russian court made a substantive parental responsibility order on 18 March 2021. The mother was given custody of the children and was entitled to decide where they lived. The father's appeals in Russia (from the first instance decision and from the dismissal of that appeal) were dismissed. On 11 June 2021, the mother issued an application in England for the recognition of the order of 18 March 2021. The father applied on 14 June 2021 for its non-recognition.

17. The hearing of the father's application for a child arrangements order and the parties' respective applications in respect of the Russian order took place before the judge in November and December 2021. By that stage, P had been joined as a party to the proceedings (by an order made on 6 July 2021). The judge gave judgment on 12 January 2022. He determined that the children were habitually resident in Russia on 9 November 2020, when the father issued his application in England for parental responsibility orders. Accordingly, the court lacked jurisdiction in respect of that application. He also decided that the Russian court's order of 18 March 2021 should be recognised and enforced.

18. In the course of his January 2022 judgment, the judge summarised the parties' respective cases on the issue of habitual residence. The father emphasised the children's connections with England, while the mother emphasised their connections with Russia. The case advanced on behalf of P was that her "centre of interests remains in Russia". It was also said, as set out in a list of eight factors in the judgment, to which the judge made "particular reference", that she "wants to return to Russia at the end of the academic year (and) then envisages doing what is the Russian equivalent of A levels". As referred to above, the judge decided that both children were habitually resident in Russia as at 9 November 2020.

19. The judge also addressed the father's case that the Russian order should not be recognised pursuant to the provisions of article 23 of the 1996 Hague Convention. The father contended that neither the children nor he had been given a proper opportunity to be heard (articles 23(2)(b) and (c)) and that recognition would be "manifestly contrary to public policy of the requested State, taking into account the best interests of the child" (article 23(2)(d)). In support of his case under article 23(2)(d), the father relied on a number of matters in respect of the process leading to the order on 18 March 2021 which, he submitted, meant that it had been so unfair that the order should not be recognised. He further argued that, if the children were returned to Russia, he would, effectively, be unable to obtain contact because the mother would deny him contact and/or because she would obtain orders from the Russian court which would have that effect.

20. The judge decided that the father had not established any of the grounds on which recognition of the Russian order could be refused. He concluded that the "high

threshold" required to establish that recognition would be manifestly contrary to public policy had not been crossed. He rejected the father's case as to the unfairness of the process in Russia. He considered that the children and the father had been able effectively to participate in the proceedings.

21. As to the future, the judge saw "no reason" why the mother would deny the father contact nor for concluding that the mother "is hostile to contact". He also considered that the father would be "fully able to argue his case" in Russia if there were further proceedings there concerning the children.

22. The order of 12 January 2022 included provision for contact between the father and T. The order included a recital in respect of contact as follows:

> "The interim child arrangements for the children are made pursuant to Article 11 of the 1996 Hague Convention and/or Article 20 of the Brussels II bis regulation on the basis that whilst the court has, pursuant to paragraph 18 below, dismissed the father's substantive application dated 9 November 2020, the court is exercising an interim and urgent protective jurisdiction whilst the children remain in England & Wales."

There does not appear to have been any challenge by the mother to the exercise by the court of jurisdiction on the above stated basis.

23. The father applied for permission to appeal against the orders made by the judge on 12 January 2022, specifically his determination in respect of habitual residence and his decision to recognise the Russian order of March 2021. That application was refused, by me, on 14 April 2022. Following this, at a hearing listed on 28 April 2022 to deal with other matters, the mother applied for the release of T's passports which were being held by her solicitors pursuant to the order made by the judge on 12 January 2022.

24. The order of 28 April 2022 contained the following recitals/agreements:

> "5. The court requires the respondent to provide proof to the applicant by 4pm on 12 May 2022 by way of letters from the lawyers for the respondent (…) and the third party P (…) to Judge … (of the) Central District Court of … Ref: (…) and the Court's acceptance of the withdrawal of both statements of claim/applications made 12 January 2022 for costs in the children Russian application.";
>
> "6. The respondent agrees to make T available to spend time with the applicant prior to her departure for Russia as follows: (on a series of dates in May 2022)"; and
>
> "7. The respondent informed the court that she will bring T back to England in June and/or July 2022 so she can spend time with the applicant. The court informed the respondent that it expected her to make proper arrangements for T to see the

> applicant during the summer school holidays (not to be limited to the period of the hearing fixed for July 2022)."

The withdrawal of the costs claims, as referred to in recital 5, was included because of a concern raised by the father (disputed by the mother) that, otherwise, he would be unable to visit Russia because the enforcement of those claims might lead to his imprisonment. On the basis of the above recitals/agreements, the judge provided that the mother's solicitors could give her T's passports "on or after 12 noon on 16 May 2022".

25. The applications made by the father on 12 May 2022 included, as referred to above, an application for orders under the CA 1989. In this, it was stated that there might be an issue as to jurisdiction. The relevant box in the form was completed as follows:

> "The respondent will argue that T is habitually resident in Russia, as a result of the decision of (the judge) dated 12 January 2022. It is my case that T (having not left England since August 2020, and being settled at school here) is plainly habitually resident in England."

26. The applications were supported by a short statement from the father, also dated 12 May 2022. He explained that it was short because his new solicitors were "not in a position to draft a full statement for me" and that he reserved "the right to file a fuller and more detailed statement in due course". He contended:

> "(a) that there has been a huge and relevant change in circumstances since the judge delivered judgment and made the orders, and (b) that the judge was misled in a number of important and relevant matters during the proceedings which led to the judgment and orders. My lawyers will expand on and explain more fully these arguments in due course."

In summary, as to (a), the father relied principally on Russia's invasion of Ukraine the consequences of which, he said, would impact significantly on his ability to see T and on his ability to engage in any proceedings in Russia concerning T. The father relied on a number of matters in support of this contention. I do not propose to set these out in full in this judgment but they included travel and other difficulties and the fact that the costs claims referred to in recital 5 of the order of 28 April 2022 had not been withdrawn. As to (b), the father said that, contrary to what the mother had said previously, P was registered to attend school in London in 2022/2023. In addition, the father relied on the distress T had shown at the prospect of being removed from her school, which had been reported by the school. She had been "unaware that she was leaving her school permanently" and moving to Russia.

27. The father's applications were listed for a directions hearing on 13 May 2022. This had been agreed between the parties (the father and the mother) in conjunction with the judge. It was made clear on behalf of the judge that he only had one hour available for the hearing. In fact the hearing took over two hours. P was not notified of the hearing and did not play any part.

Judgment Below

28. At the hearing on 13 May 2022, the father, represented by Mr Devereux, submitted that the court was not fairly in a position other than to give directions such as for the filing of additional evidence, including from the mother, with the listing of a further substantive hearing at which his applications could be properly considered. The father needed time, as recorded in the judgment below, "to put his case to a much fuller extent".

29. This submission was rejected by the judge. He clearly considered that the father had had sufficient time to prepare his applications and that he, the judge, had sufficient information to decide whether, as he put it in his judgment, the applications "reached first base" or whether, as he put it during the hearing on 13 May, whether the father "has established a *prima facie* case".

30. In the course of that hearing, in response to Mr Devereux referring to the father's case about his ability to go to Russia, the judge responded that this had been "a long-running theme of (the father's) but there has never been any evidence in support other than his say so". Mr Devereux acknowledged that it was "a theme that was certainly ventilated within the hearing before" but, he added, "the geopolitical situation has changed and that is the added dimension". At the conclusion of Mr Devereux's submissions, the judge summarised the case being advanced by the father as comprising a "big picture" argument and a "small picture" argument. The former comprised the geopolitical events which, it was said, created risks for the father if he were to go to Russia; the latter comprised contact arrangements and the withdrawal of costs claims. In addition, as referred to above, Mr Devereux relied on, as a further point "in the background", T "exhibiting great distress" at the prospect of moving to Russia.

31. In his judgment, the judge described the father's applications as having been made "at the last possible moment". He again summarised the matters being advanced as comprising:

> "First of all the big picture, what Mr Devereux QC who appeared on his behalf, describes as the "geo-political scene," which he says has changed dramatically since January of this year. Secondly, in the small picture, because he said the contact arrangements have not been finalised for the father to be with S over the course of the summer, and because the mother has failed to properly satisfy the court that there are no outstanding financial claims hanging over the father's head if he were to go to Russia."

32. The judge rejected the father's case that Russia's invasion of Ukraine and its geopolitical consequences provided any substantive justification for the father's applications or in any way undermined the order he had made in January 2022. He did "not accept that (the father) is at any particular risk" nor was he persuaded that the father's "access to Russian courts is hindered in any way".

33. As to the "small picture" points, the judge also did not consider that any issues about contact supported the father's applications. He was concerned about the lack of clarity as to whether the claims for costs in Russia had been effectively withdrawn or whether the court had merely acknowledged receipt of the application that those claims were waived or abandoned. However, although this "has caused me more thought", he decided that "what has been provided is sufficient to satisfy the order (of 28 April 2022) and I also think that it is not appropriate for me to require more".

34. Accordingly, the judge decided that there was no sufficient merit in the matters relied on by the father to justify the continuation of his applications because they provided no reason to revisit or reopen the January 2022 order: they did not add "anything new of substance to what we had before". He concluded: "I am therefore satisfied that the father has not produced any argument that would pass the test for a reopening of the order that I have made and I, therefore, dismiss the applications". The judge also ordered the father to pay the mother's costs of the applications summarily assessed at £9,000.

35. During the course of the hearing on 13 May 2022, the judge raised the issue of contact between the father and T in June and July 2022. The mother indicated that she would be in England with T between 15 and 25 June and it was submitted that there was "no risk" that she would not return. Mr Gupta drew attention, in general terms, to the judge's jurisdiction being "limited". However, when the judge asked expressly whether the mother would consent to an order dealing with contact, Mr Gupta replied that she would. After the hearing, Mr Gupta informed the judge by email that the mother had changed her mind and would not consent to an order. The judge, nevertheless, as referred to above, made an order that the mother should bring T to England for the period 15 and 25 June 2022.

36. At the end of his judgment, the judge indicated that he was considering giving a "very, very short stay" to give the father some time to make any application for permission to appeal and for a stay to the Court of Appeal. It is clear from the discussion that then followed with counsel, that the issue being addressed was primarily T's departure from England. This can be seen, for example, from Mr Gupta saying that the mother would be very disappointed if a stay was granted beyond the following Monday morning as the mother had flights booked for later that day and, from him saying later, that the effect of the proposed stay would be that the mother would be unable to remove T from the jurisdiction.

37. The father's application for permission to appeal and for a stay was lodged with the Court of Appeal on 17 May 2022. On the same day, I granted a stay in the terms referred to above. Despite this, again as referred to above, the mother left England with T on 18 May 2022 having obtained alternative travel documents from the Russian Embassy.

38. By letter dated 19 May 2022, the mother's solicitors confirmed that they still held T's passport but that the mother had left England with T on 18 May 2022. The letter also contained proposals as to contact between the father and T. These comprised indirect contact between the father and T with the father also being "welcome" to see T in Russia. There was no proposal for direct contact anywhere else and no indication that the mother would be returning with T to England despite the assurances made on her behalf at the hearing on 13 May that she would be.

39. On 1 June 2022, pursuant to a court order, the mother filed a statement dealing with her removal of T and her proposals for contact in June. She "vehemently" denied acting in breach of any court order. Her proposals as to contact essentially repeated those set out in the letter of 19 May.

Submissions

40. The respective cases of the father and the mother were comprehensively set out in their written and oral submissions. I propose only to summarise those submissions in this judgment but I have taken all the matters raised into account when determining these appeals. I deal with the parties' submissions in respect of the funding of costs below.

41. The father's case is that the judge was wrong summarily to dismiss his applications at the hearing on 13 May. Mr Tyler rightly accepted that it is within the court's case management powers summarily "to dismiss, for example, vexatious applications". He submitted forcefully, however, that the father's applications were not in this category because they raised substantive issues which required detailed consideration. The matters relied on by the father were sufficient to demonstrate, at least, an arguable case that there had been significant changes in circumstances since the January 2022 order which undermined the basis on which it had been recognised. These matters "required a far greater level of consideration and analysis" than that given by the judge during the hearing on 13 May 2022. This was a "matter of fairness and proper procedure".

42. Mr Tyler highlighted the matters which had been relied on by the father in support of his previous case that the March 2021 order should not be recognised. He also referred us to a number of other passages in the judge's judgment of 12 January 2022 which, he submitted, were relevant to the applications made by the father in May 2022.

43. The main focus of Mr Tyler's submissions was, first, that the "serious issues" advanced by the father required a more considered evaluation and a more involved process than that which occurred. The judge failed "to grapple properly" with the issues raised by the father. He also submitted that the judge had not been entitled to conclude either that the father was not at any particular risk or that his access to courts in Russia was unhindered. In addition, the father had raised questions about the accuracy of some of the mother's evidence to the judge at the November/December 2021 hearing, such as where P would be completing her school education, which in turn also raised questions about the mother's "good faith".

44. Secondly, he submitted that, as a result of Russia's invasion of Ukraine, the consequences of the court's recognition of the Russian order were significantly different to those envisaged in January 2022. This meant that the court should reconsider whether such recognition would be manifestly contrary to public policy. These consequences concerned, in particular, the father's ability to have contact with T and his ability to access justice in Russia.

45. Mr Tyler made brief submissions about the court's jurisdiction to set aside the recognition of a foreign parental responsibility order. He referred to *In re W (A Child) (Return Order: Power to Set Aside)* [2018] 4 WLR 149 and *In re B (A Child)* [2021] 1 WLR 517.

46. In response to the mother's appeal, Mr Devereux submitted that the issue of the court's jurisdiction to make limited contact orders had not been challenged at the hearing. He also drew attention to the fact that jurisdiction had previously been accepted as confirmed by the terms of the recital and the provision for contact in the order of 12 January 2022 (as set out above). He submitted that, in any event, the judge had power to make the order which he did under article 11 of the 1996 Hague Convention. In support of the latter submission, he relied on passages from Lady Hale's judgment in *In re J (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 1291.

47. Mr Gupta submitted that the judge's decision to dismiss the father's applications had been "firm but fair". He pointed to the judge's very extensive experience of this case which made him extremely well placed to determine whether the father had raised any matter which justified further proceedings including reconsideration of the recognition of the Russian court's order. The father's "complaints" mirrored issues which he had raised previously and were unsupported apart from his bare assertions.

48. Mr Gupta acknowledged that the issue of jurisdiction to set aside the recognition of a foreign order had not been raised before the judge, but, he submitted, the judge had effectively decided not "to permit any reconsideration", as referred to in *Re B*, at [89(a)].

49. In respect of the mother's appeal, Mr Gupta again acknowledged that the issue of the court's jurisdiction had not been argued before the judge. It had been raised after the hearing when the mother withdrew her consent to any order dealing with contact in June and July 2022. Mr Gupta submitted that article 11 of the 1996 Hague Convention did not provide jurisdiction to make an order in this case. Alternatively, he submitted that, if there was jurisdiction, the judge was wrong to have exercised it.

Determination

50. In respect of the father's appeal, the issue we have to decide is whether the judge was wrong summarily to dismiss the father's applications. In short, was the judge entitled to decide that the father's applications lacked sufficient merit to warrant their continuation?

51. I would first just comment on the issue of the court's jurisdiction to set aside the recognition of a foreign parental responsibility order.

52. There was no debate before the judge about this issue and only very limited debate during the hearing of this appeal. I do not propose to address this issue in this judgment because it is not necessary for me to do so. All I would say is that, as noted by Peter Jackson LJ in *Re E (BIIa: Recognition and Enforcement)* [2021] Fam 211, at [2], the relevant international instruments "provide a mechanism for the mutual

recognition of judicial decisions, so that a judgment in one participating state is to be recognised and enforced in another participating state in effect *as if it was* a domestic judgment given in that state" (my emphasis). It is also relevant to note that the circumstances in which this issue might arise can vary significantly from the perspective of the court's jurisdiction. It might be that substantive parental responsibility jurisdiction remains with the foreign court and the English court's powers will, therefore, be limited. On the other hand, it might be that the English court has acquired substantive jurisdiction since the foreign order was made because the child has become habitually resident in England. In the latter circumstances, the approach to be taken is that set out in *Re E* and *Re A (A Child) (Enforcement of A Foreign Order)* [2022] EWCA Civ 904 (1 July 2022).

53. The parties were agreed that the judge had power to decide that the father's applications lacked sufficient merit to justify their continuation.

54. The first ground of appeal challenges the judge's decision to dismiss the applications at what was listed as a directions hearing rather than, as "a matter of fairness and proper procedure", listing them for a further, and longer, substantive hearing.

55. I have no doubt that the judge was entitled to decide that he was in a position fairly and properly to determine whether, as he put it, the father had "established a *prima facie* case" which justified the continuation of the applications. The father had had time to consider and prepare for any application that he might wish to make in the event of his application for permission to appeal the January 2022 order being dismissed. Indeed, the former did not depend on the outcome of the latter. Further, it is clear from the transcript of the hearing, and also from Mr Tyler's submissions on this appeal, that the father's case for the applications to be adjourned was put in very general terms without any degree of specificity as to what additional material or additional submissions he needed further time to obtain or prepare.

56. The second ground of appeal contends that the judge was wrong to decide that the applications lacked sufficient merit to warrant their continuation. Again, it is clear to me that the judge was entitled to decide that the father had not established a *prima facie* case in respect of any of the applications. As Mr Gupta submitted, the judge's extensive involvement with these proceedings put him in a very good position to decide this issue. None of the matters advanced on behalf of the father demonstrate that the judge's decision was materially flawed or was wrong.

57. The judgment is brief, but it sufficiently explains why the judge decided to dismiss the applications. He was entitled to decide that the matters relied on by the father "did not add anything new of substance to what we had before". As I have said, the judge was very well placed to make this assessment. He was also entitled to decide that the father was not "at any particular risk" and that his access to justice in Russia was not "hindered in any way". These conclusions were, no doubt, based on the judge's broad knowledge of the case and this court is not in a position to say that he was wrong to reach them.

58. I would just make one final observation in respect of the father's appeal. The father's case focused more on his application to reopen the recognition of the Russian court's order than it did on his application under the CA 1989. I have referred above to the decisions of *Re E* and *Re A*. The circumstances of the present case are not the same as

in those cases because the judge had already decided to recognise the Russian order by his order in January 2022. At that time, no substantive welfare application had been made by the father. However, for the avoidance of doubt, in my view it is clear that the judge was also very well placed to decide whether to embark upon a welfare assessment in response to the father's substantive welfare application in May 2022. Leaving aside the issue of whether T was by then habitually resident in England (in respect of which I acknowledge the strong arguments advanced on behalf of the father), the issue the judge had to decide was whether, as set out by me in *Re A*, at [59], "the circumstances are such that the exercise by the court of its substantive jurisdiction by undertaking a welfare assessment is justified".

59. It is right that the judge did not express it in these terms, no doubt reflecting the way in which the submissions were made to him, but he was clearly considering whether there was anything which justified revisiting his earlier decision, the effect of which was that T should live with her mother in Russia. I appreciate also that the judge's earlier decision was not a welfare decision. However, when he said that "there is no good reason why I should delay (her) return any further", the judge was clearly looking at this from a broad perspective and considering whether, as it was put in *Re E*, at [73(2)], and in *Re A*, at [58], it was "appropriate on the facts of the individual case to embark upon a welfare assessment".

60. In conclusion therefore, for the reasons set out above, the father's appeal from the order of 13 May 2022 must be dismissed.

61. I now turn to the mother's appeal. I do not propose to consider this at any length because, as referred to above, the issue of jurisdiction was not substantively raised before the judge below. The highest it appears to have been put during the hearing was that the judge's jurisdiction was "limited". Further, the mother said she would consent to an order. It was only after the conclusion of the hearing that she changed her mind. In my view that was too late and it is certainly too late to raise this argument by way of an appeal.

62. In any event, it is clear to me that the judge had jurisdiction to make the limited order for contact which he did. This was to cover the immediate period after T's removal from England. No other court and no other judge was as well placed as the judge in this case to decide, and to seek to ensure, that direct contact took place in that immediate period. There are, of course, limits on the extent to which article 11 can be properly used but the judge did not exceed those limits.

63. Article 11(1) of the 1996 Hague Convention provides:

> "(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection."

As Lady Hale explained in *In re J*, at [34],

> "It is obviously consistent with the overall purpose of the Convention that measures of protection which the child needs now should not be delayed while the jurisdiction of the country

> of habitual residence is invoked. On the other hand, the article 11 jurisdiction should not be used so as to interfere in issues that are more properly dealt with in the home country. It is a secondary, and not the primary, jurisdiction…"

64. In my view, in circumstances where T was due to move to Russia in the middle of May, it was "obviously consistent" with the 1996 Hague Convention for the issue of contact in June, and even July, to be dealt with by the judge before T's departure from England. This issue needed to be urgently addressed and could not sensibly "be delayed while the jurisdiction" of Russia was invoked. The contrary argument is unsustainable. Accordingly, the mother's appeal must also be dismissed.

65. I now turn to the father's application for permission to appeal from the judge's refusal "to permit the release of funds to (the father) from the Coutts account to meet incurred and anticipated costs in relation to children proceedings". Fortunately, after the grant of permission to appeal, the parties were able to agree the provision of funds to the father for the purposes of the parties' respective appeals to this court.

66. The background, in very brief summary, is that a Coutts account in England in the mother's sole name has been frozen to provide security for the father's Part III application. A number of orders have been made in respect of the use of the funds in the account to meet the parties', and P's, legal costs. The current position appears to be that the wife/mother has free access to the account to meet her legal costs while the husband/father has to obtain orders from the court every time he seeks to use the funds to meet his legal costs. As Mr Tyler submitted, this is very far from ensuring a "level playing field" or, to put it another way, equal access to justice. It is also not clear what other funds are or might be available to the mother whereas it is clear that the father has no other resources than those provided from this account.

67. The application for permission to appeal, however, does not involve the status of the current structure governing access to the account for legal costs. It concerns the judge's decision to refuse to provide the father with further funds to meet costs in respect of the children proceedings, just under £50,000 for incurred costs and, it appears, a further sum of £50,000 (plus VAT) for "likely" costs, in particular, in respect of the mother's removal of T from the jurisdiction. Greater sums had been sought in the statement filed by the father's then solicitors but, at the hearing on 10 June 2022, the amounts in fact sought were the more limited sums to which I have just referred.

68. The judge did not specifically address the father's application for these costs in a separate judgment. It was also not entirely clear from the transcript of the hearing itself whether the judge had dealt with this application. However, the parties agreed that he did and, indeed, his order of 12 June 2022 expressly provided that the father's application for permission to appeal the judge's refusal to release funds was refused.

69. During the course of the hearing below, the judge indicated that he was "not impressed with" the application for sums in respect of the children proceedings. In respect of incurred costs this was, in particular, because he had decided that the three applications made by the father were without merit. He referred to this claim as a "non-starter". He was equally not persuaded that any further sum for representation in the immediate future was justified.

70. I have already referred to my concern at the effect of the current structure in respect of legal costs. I also consider that Mr Tyler has legitimate cause for complaint about the wholesale rejection of the application for legal funding for costs in respect of proceedings concerning the children including because, in my view, it was predictable that the father would need legal assistance to address the issue of contact as provided for in the order of 13 May 2022 when the mother had left England on 18 May, as described above.

71. However, on balance, I am not persuaded that the judge's decision can be said to have been wrong. It was not a decision which was outside the range of permissible discretionary decisions. The judge was entitled to decide that payment of the incurred costs was not justified when he had rejected the father's applications and made an order for costs against him. He was also entitled to decide that a sum for future costs was not justified including because, as he noted, the mother had been ordered to pay at least some of the father's costs by an order made by Moor J.

72. In conclusion, therefore, I propose that the father's application for permission to appeal is allowed but that the substantive appeal is dismissed.

Lord Justice Peter Jackson:

73. I agree. My only additional comment relates to the refusal of the costs funding order. The tally of costs incurred by these parents (and their daughter) is already enormous, and it will grow as the financial proceedings continue. In a case of this complexion, the allocated judge is likely to be best placed to assess an interim costs issue and I would be very reluctant to interfere with a decision of this kind.

Lord Justice William Davis:

74. I agree with both judgments.