Neutral Citation Number: [2022] EWCA Civ 1664

Case No: CA-2022-001637

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE POOLE
FD22P00354

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2022

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE WARBY

- -

Re A and B (Children)
(Summary Return: Non-Convention State)

- -
- -

Henry Setright KC and Anita Guha (instructed by **Dawson Cornwell**) for the **Appellant**
Edward Devereux KC and Mehvish Chaudhry (instructed by **Hanne & Co Solicitors LLP**) for the **Respondent**

Hearing date: 20 October 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The mother appeals from the order made by Poole J on 29 July 2022 which provides for the return, in the care of the mother, of two children, A aged 10 and B aged 8, to the United Arab Emirates. This order was made following a summary welfare hearing, the UAE not being a party to the 1980 Hague Child Abduction Convention ("the 1980 Convention").

2. The core of the mother's case in support of her appeal is that the judge failed properly to apply the guidance given by the Supreme Court in *In re NY (A Child) (Reunite International and others intervening)* [2020] AC 665 ("*Re NY*") and the provisions of Practice Direction 12J of the Family Procedure Rules 2010, *Child Arrangements & Contact Orders: Domestic Abuse and Harm* ("PD 12J"). It is said the judge was wrong not to conduct a fact-finding hearing in respect of the mother's allegations that the father had been abusive including by subjecting her to controlling and coercive behaviour. It was argued that, without such a hearing, the court was not in a position properly to decide whether it was in the children's best interests to return to the UAE. It was also submitted that the judge's welfare analysis and decision to make a return order were flawed in a number of respects.

3. The expression which is often used, and was the order sought by the father in his application, is a summary return order. In the context of the present case, that is, in fact, shorthand for a return order made after a summary welfare determination. This is relevant because a summary return order more accurately defines an order made under the provisions of the 1980 Convention. It is also important because the exercise in which the court is engaged when the court is determining an application for a return order under the inherent jurisdiction or the Children Act 1989 ("the CA 1989") is *not* the same as when the court is determining an application for the return of a child under the 1980 Convention. However, in this judgment, I will continue to use the expressions "summary return" and "summary return order" but I do so in the terms explained above.

4. The mother was represented by Mr Setright KC and Ms Guha, neither of whom appeared below. The father was represented by Mr Devereux KC, who did not appear below, and Ms Chaudhry who did appear in the court below.

5. For the reasons set out below, I have concluded that the appeal should be dismissed.

Background

6. The judgment below is reported: *Re A & B (Children: Return Order: UAE)* [2022] EWHC 2120 (Fam). In his judgment, the judge anonymised the relevant Emirate to E. At the outset of the hearing of the appeal, the parties agreed that it need not be anonymised but could be identified as Dubai (I have not amended the references when I quote from the judgment below). Apart from this, the usual reporting restrictions in respect of identifying the family and the children remain in place.

7. The father is a British national of Indian ancestry. He was born in England but has lived and worked in Dubai since 2005. His parents also live there, as do many other members of his family.

8. The mother is an Indian national. She was born in Kuwait but grew up in India. She moved to live with her parents in Dubai in about 2006. In addition to the mother's parents, several other members of her family live in Dubai.

9. The parents married in 2007. They lived in Dubai. The children were born in England but have always lived in Dubai until brought to England by the mother in October 2021.

10. The parents separated in 2018. The children and the mother moved to live with her parents. As set out in the judgment below, at [3]: "They would spend time in their father's sole care during school holidays and at weekends. The extent of the time spent with the father is disputed."

11. In October 2021, the mother came to England with the children for the purpose of renewing her biometric residence permit. They were due to return two weeks later but they have remained living here since then. They live in a property owned by the paternal grandparents. The children attend a local school.

12. The mother described her decision to stay in England in her statement, as set out in the judgment below, at [12]:

> "When I made plans in October 2021 to travel to England with the children to obtain my BPR, I had not planned to stay. Almost immediately, however I felt an enormous sense of relief and independence; the children and I left behind the toxic world that we had accepted as normal. No one shouted at us, we had independence …
>
> The life we had led in Dubai was emotionally damaging for us all and I had pretty much given up on any real quality of life. With my arrival in England, everything changed. I felt the ability to be free and independent for the first time since our marriage and cannot contemplate being compelled to return to Dubai."

13. The father issued his application for a summary return order in April 2022.

14. The parties both filed statements in respect of that application. Expert evidence on the law of Dubai was obtained from Diana Hamade, a lawyer practising there as a specialist in family law.

15. In her statement, the wife alleged that: "Physical, verbal, emotional and financial abuse had become a part of my life from the time I was newly married. Our children have unfortunately both witnessed the abuse since they were young". She exhibited a great deal of material to her statement including photographs and digital messages. The father denied that he had been abusive and also exhibited a large number of text messages.

16. Ms Hamade provided a detailed report and also gave oral evidence. The judge summarised aspects of her evidence, at [16]. These included that:

> "iii) A woman would not be able to establish allegations of domestic abuse unless there had been police involvement, abuse had been witnessed by reliable witnesses, there was clear medical evidence, or the court could see injuries for itself. Photographs or other evidence will not be relied upon to establish such allegations. Hence, in the present case the mother's allegations of past abuse will not be established in the courts in E.
>
> iv) Allegations of abuse against children would be referred to the criminal justice system in E and would not be dealt with in the civil system.
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> v) The mother would have no chance at all of securing permission from the court to relocate with the children abroad if the father did not agree and he was living in E. This would "never ever" happen."

The expert, at [16(vii)], referred to a "settlement agreement" which could be entered into by the parties and which could "be entered as a judgment in the courts in" Dubai. It would then be "binding". Her experience was "that these settlement agreements are honoured":

> "Their terms can include custody, guardianship and visitation rights. The parties could agree that the mother shall have custody of the children with defined contact with the father. Settlement agreements can include pledges or undertakings including that the father will not instigate criminal proceedings against the mother. However there are no sanctions for breaching an undertaking although Ms Hamade's evidence was that a financial imbursement can be requested amounting to large amounts of money."

The expert also referred to a Federal Law of 2019 "concerning Protection Against Domestic Violence". This Law "criminalises physical violence" to which "have been added … psychological, sexual and economic abuse".

17. The children were seen by a Cafcass Officer who also gave oral evidence. I set out below the judge's summary of her evidence.

Judgment

18. The judge described, at [5], the general circumstances of the children's lives in Dubai before they came to England in 2021:

> "When the family were together they were well housed, financially comfortable, went on a number of holidays abroad, and the children were well-educated. Upon separation the mother and children lived with the maternal grandparents. The mother did not work and, it appears, was financially supported by the father and her parents."; and

> "The children attended a fee-paying, English school where reports show that they were both excelling and achieving high grades."

After they separated, the father said that "there was a shared care arrangement with the children spending some weekends and parts of the school holidays with him". The mother disputed the extent of the father's involvement with the children and said that he "would take the children to his parents' house on a few Friday afternoons until Saturday afternoons" and that "the children would spend only a few unscheduled days with their father" during school holidays.

19. The judge noted, also at [5]:

> "There is no evidence that the children showed any signs of distress or behavioural issues during the period of separation prior to October 2021. Indeed their school reports suggest that they were well-adjusted children who fitted in well. The father has exhibited text exchanges with A which are funny and affectionate, and cordial exchanges with the mother, most of these being after the separation."

20. The judge next summarised the mother's allegations of abuse. They included the following, at [6]:

> "the mother says, "the life we had led in E was emotionally damaging for us all and I had pretty much given up on any real quality of life". She alleges that throughout the relationship the father was physically, emotionally, and financially abusive, and coercive and controlling of her. She alleges that he physically and emotionally abused the children. There are no records of complaints to the police or authorities, no corroborative evidence from relatives or friends (only a one-paragraph statement from a woman who worked for them), and no contemporaneous evidence from the children's school. There is no evidence of any injuries to the children. The mother does exhibit photographs showing bruising and abrasions to her face and body from 2009, 2012, 2016, and 2019 and some damage to furniture in 2017. She also exhibits messaging from the father that shows him to be angry and hostile to the mother including messaging about what he regarded as frivolous spending, and messages to A that show him to be angry with her apparently because he felt excluded from some activities in June 2021. He comes across as more childish than his young daughter during those exchanges."

21. There were two videos of the children speaking, which appeared to the judge, at [7], to be "obviously staged in the sense that the children are not spontaneously speaking whilst the camera is on, rather, they appear to have been asked to say or repeat something once the filming starts".

22. The judge summarised the evidence from the Cafcass Officer, Ms Baker. The children had told her, at [8],

> "of instances when the father had hit them, and of them witnessing his abuse of the mother. A went on to describe her father as both "violent and abusive", saying that he would "hit, slap and pinch" the children for not doing their homework and this would sometimes leave visible marks on them." She recalled her parents' arguing and the father leaving the mother on the floor, abusing her, and breaking mirrors in the bedroom. The mother's photographs of broken mirrors are from August 2017 when A would have been five years old. B reported to Ms Baker, "he just used to like hit us when we went to his house and when we did something wrong he made us do punishments, but I miss him". He talked of the father hitting them with "tiny slaps" and shouting at the children."

23. Ms Baker considered "A's opinions [to be] very polarised. The mother was good and the father was bad". A "had appeared genuine when talking to her". In respect of B, she said that "much of [his] language was adult in nature and was suggestive of direct or indirect adult influence, meaning that he had either been told some of the things he was reporting to Ms Baker, or he had overheard them". His views were "less polarised".

24. As explained in the judgment below, Ms Baker recommended that the children should be returned to Dubai. Having heard the oral evidence of the legal expert, which made clear, at [17], that "the legal system in E … was more restrictive of the mother's rights than she had previously understood", Ms Baker was "less sure about [her] recommendation … but she nevertheless [maintained] her view".

25. In a section headed "The Legal Framework", the judge set out a summary of the legal principles from Cobb J's judgment in *J v J (Return to Non-Hague Convention Country)* [2021] EWHC 2412 (Fam) ("*J v J*"). That judgment, as quoted by the judge, at [19], included extensive summaries of the points made in Baroness Hale's speech in *In re J (A Child) (Custody Rights: Jurisdiction)* [2006] 1 AC 80 ("*Re J*") and in Lord Wilson's judgment in *Re NY*. The latter included, at [38] of *J v J*, Lord Wilson's references to section 1(3) of the CA 1989 and to PD 12J and to the need for the court to consider whether an inquiry should be conducted into allegations of abuse and, if so, how extensive that inquiry should be. Additionally, the judge quoted what Baroness Hale had said in *Re J*, at [39], as quoted below, about the relevance of the "absence of a relocation jurisdiction".

26. The judge noted, at [21], that the allegations of abuse "nearly all" pre-dated the parties' separation and that "the only allegation of significance after the separation, is from 2019". He referred to the evidence he had of "the effect of the alleged abuse on the children and the mother from Ms Baker and from the mother herself". He decided that it was not necessary for him to determine the allegations of abuse: "The court has to make a welfare determination concerning summary return and the resolution of allegations of abuse is not required to make that determination".

27. In a passage criticised by Mr Setright, the judge said, at [22]:

> "The approach I take, borrowing from the approach in Hague Convention cases in accordance with *In re E (Children)* [2012] 1 AC 144, is that I should make a reasonable assumption in relation to the maximum level of risk to the children arising out of any domestic abuse perpetrated by the father. I should, in particular, consider the risks to the children in the context of a return to E, with any undertakings or pledges offered by the father being formalised in the courts in E, and bearing in mind the enforceability of those undertakings in E."

28. The judge set out, at [23], the mother's case including the "core submission" that a "full welfare assessment" was required before the court could properly determine the father's application.

29. The judge's conclusions were set out over six pages, at [25]-[31]. He first stated that the children's welfare was his paramount consideration and that he had to have regard to the welfare checklist in section 1(3) of the CA 1989. He analysed, at [26], "the most salient features of the case", which numbered 18 factors. These included the children's deep connections with Dubai and their very limited connections with England. He addressed the mother's allegations of abuse in detail.

30. I do not propose to quote that analysis in this judgment but it clearly shows the judge engaging with the mother's allegations and other relevant factors for the purposes of deciding whether he was in a position properly to make a welfare determination without further investigation and what order to make. Some elements of this are criticised by the mother as misstating her evidence, such as the judge's comments, at [26(vii)], that the "allegations that the father has abused the mother in large part concern events before the separation in 2018 and the most recent allegation dates from 2019"; that "the allegations [of coercive and controlling behaviour] concern past events from well before the children were retained in England"; and that "there is no credible evidence of continuing coercive and controlling behaviour". I deal with this further below.

31. At [26(ix)], the judge set his conclusion as to whether a fact-finding hearing in respect of the allegations of abuse was necessary:

> "I do not believe that further detailed investigation of the allegations of abuse by the father will assist the court in making the decision about return. Even assuming the allegations of abuse of the mother are all true, there are no incidents since 2019, and the mother would be in a more supportive environment in E that in England. On the mother's own case, there was not much contact between her and the father. I do not see her allegations as making out a case that the children were being significantly harmed by any ongoing abuse of her by the father after the separation. The extent and impact of the father's abuse of the children is also quite limited when objectively examined. Again, the mother says that they did not have very much contact with the father. Most of what A alleges is that the father is unkind to her and has smacked her by way of chastisement. B says he has been smacked too. They say the

> father has been nicer to them on calls recently but put that down to him being "fake". However, whilst not condoning physical chastisement, the father's treatment of his children is not so concerning that it would preclude return. If the allegations of abuse of the children are all true, then they do not give rise to a significant concern that return to E would in itself put them at risk of harm in the future. It has not been suggested that contact with the father should cease, indeed the mother complains through counsel that he has not visited England more often. The father will have contact with the children whether they are in England or E. Similarly, the father has accepted at the hearing before me that the children should continue to live with the mother. The allegations of abuse are an important element of this case but they are not so significant as to be determinative. Whilst the father disputes the allegations, I do not believe that making findings about the allegations is necessary."

32. The judge accepted, at [26(x)], the evidence of the Cafcass officer "that the separation of the father from the children is damaging to them". He considered the children's wishes, which were to remain in England. He said, at [26(xiii)], that this was "a significant factor" but considered that "their views, however genuinely expressed, have undoubtedly been directly and/or indirectly influenced by the mother and by the circumstances of their retention and this litigation".

33. The judge also dealt, at [26(xvi)], with the absence of a relocation jurisdiction in Dubai:

> "The effective inability of the mother to apply for relocation upon return to E does indeed do more than give the court reason to pause. It is a factor that weighs against summary return. However, in my judgement the mother's application would, even applying principles that would be applied in this jurisdiction, be very likely to fail. The children's strong connections in E, the relatively slight connections with England, the close family networks in E, the father's presence there, the mother's retention of the children against his will after October 2021, would all weigh against granting relocation in the children's best interests. Of more concern is that if circumstances changed so that it did appear to be in the best interests of the children to relocate, the E courts would still not countenance it if the father objected and lived in E."

34. The judge considered the matters set out in section 1(3) of the CA 1989 and noted, at [28], that "Not all the factors point the same way":

> "The court has to consider all the circumstances and balance them. The allegations against the father, the wishes and feelings expressed by the children, and the E courts' approach to relocation applications, the voice of the child, and allegations of past domestic abuse, weigh in favour of refusing the father's

> application for summary return. The children's strong connections to their home country, E, the damage caused by their retention in England which is likely to deepen the longer they remain here, the protective factor of the wider family and their school in E, weigh in favour of ordering summary return. These are some of the key relevant matters, but all the matters set out earlier in this judgment must be taken into account."

35. The judge's concluding analysis, at [29], was as follows:

> "The approach of the courts in E to a relocation application by the mother gives me most reason to question whether summary return is in the best interests of the children, but in the circumstances as they would be on return, I would regard such an application as being without substantial merit in any event. The allegations against the father, at their highest, are not a determinative factor in this case. The children's wishes and feelings have, I conclude, been heavily influenced by the circumstances of their retention in this country, their isolation from the father and the wider family and their emotional reliance on the mother as the only person close to them with whom they now have regular contact. Their wishes and feelings are taken into account but their weight is reduced by the circumstances leading to their expression. Weighing all the evidence and considerations together, in my judgement it is in the best interests of the children to be returned now to E."

36. The judge then set out, at [30], a number of conditions that he required to be put in place to "protect the best interests of the children" in returning to Dubai. These included a settlement agreement, as referred to by the expert on Dubai law, which needed to address certain specified matters, which he listed. The agreement "must be confirmed to have been entered into a judgment in the court in E prior to the children's return".

Submissions

37. I set out below a summary of the parties' respective written and oral submissions.

38. Mr Setright's submissions raised a large number of points across a very broad canvas. With all due respect to him, some were more clearly formulated than others, which were only touched on in passing, and some travelled outside the scope of the Amended Grounds of Appeal. I do not propose specifically to deal with all the points he raised.

39. As referred to above, the focus of the Amended Grounds of Appeal was whether the judge had failed to comply with the guidance given by Lord Wilson in *Re NY* and with the provisions of PD 12J and was wrong when he decided not to undertake a fact-finding hearing in respect of the allegations of abusive behaviour before deciding whether to make a summary return order. This reflected, it was submitted, a flawed approach to the issue of domestic abuse. It undermined the judge's order because, in the absence of any such hearing, his welfare determination was inevitably flawed.

40. A number of other Grounds were advanced in support of the submission that the judge's overall analysis was flawed including: that he had misstated or reached a number of flawed conclusions in respect of the mother's allegations of abuse; that he failed properly to consider the availability of protective measures for the victims of domestic abuse in Dubai; that he failed to consider whether the children should have been separately represented; that his approach to the absence of a relocation jurisdiction in Dubai was flawed; that he failed properly to consider the issue of the children's habitual residence; and that he was wrong to include provisions for direct contact in the settlement agreement;

41. At the outset of his oral submissions, Mr Setright submitted that this case raised the question of the approach which the court should take to the evaluation and determination of an application for a return order to a non-1980 Convention State when the parent, in opposing the order, relies on domestic abuse to which PD 12J applies. At a high level, Mr Setright submitted that, whenever a parent relies on domestic abuse which will not be addressed in the courts of the other country, the court should not make a summary return order without first conducting a fact-finding hearing or, perhaps, undertaking a sufficient investigation which "results in a conclusion that the children's welfare will not be offended by a summary return". He appeared, at least initially, to put this forward as some form of mandatory rule.

42. In respect of the present case, he submitted that the judge made a number of specific errors which vitiated his decision. First, the judge had failed to apply or to comply with the provisions of PD 12J and the guidance given in *In re H-N; In re H; In re B-B; In re T; Practice Note* [2022] 1 WLR 2681 ("*Re H-N*"), in that he should have either "engaged in a degree of fact-finding" or should have, at least, case managed the application so as to bring "greater clarity" to the evidence. This was, in particular, because the Dubai courts would not address or take into account the mother's allegations of past abuse at all.

43. Secondly, the judge had not sufficiently or accurately analysed the mother's allegations of abuse. For example, the mother had alleged that the father's abusive behaviour had continued after the parties' separation. The judge was, therefore, wrong to say that there was "no credible evidence of continuing" abuse. In failing to undertake a more detailed inquiry and in discounting the effect of the mother's allegations, the judge had not given proper weight to the mother's allegations and to the continuing harm caused by domestic abuse. This also had the effect that the children's voices were not properly heard and their objections not properly considered.

44. Thirdly, the judge had failed properly to take into account the absence of a relocation jurisdiction in Dubai. This was because the judge had wrongly concluded that, by English standards, the mother had a weak relocation case when he was not in a position to make any such determination without either a fact-finding hearing or further investigation.

45. The judge had also wrongly elided the approach taken in 1980 Convention cases, as set out in *Re E*, with the approach in non-Convention cases by making assumptions as to "the maximum level of risk". This had, in particular, distracted the judge from making the children's welfare his paramount consideration.

46. Mr Setright also submitted that the judge had been wrong to make, in effect, a contact order through the terms of the settlement agreement because he had not been in a position properly to determine what contact was in the children's best interests.

47. I can summarise Mr Devereux's submissions more succinctly. He submitted that the judge's approach was "entirely consistent" with the guidance set out in *Re J* and *Re NY* and with the FPR 2010 including PD 12J. The judge was "fully alive" to the allegations of domestic abuse raised by the mother. He considered whether a fact-finding hearing was necessary to determine the father's application for a summary return order and concluded that it was not. This was, Mr Devereux submitted, a decision that was open to the judge and which he has sufficiently explained and justified.

48. He submitted that the judge had undertaken a careful review and analysis of the evidence and had balanced the relevant factors for and against a summary return when deciding to make a summary return order. He had gone through the mother's allegations of domestic abuse carefully. He had treated them seriously and had recognised that they were an important part of his overall analysis. The judge had made the return order conditional on there being a court approved Settlement Agreement.

49. In respect of the mother's criticism of the judge's approach to *Re E*, Mr Devereux submitted that this was not a submission properly open to the mother. At the hearing below, her then counsel had submitted that, if contrary to his primary submission that there should be a full welfare inquiry, the court was making a summary determination, the court should approach the mother's allegations in accordance with that set out in *Re E*. He also pointed to the reference to taking allegations "at their highest" in paragraph 15 of the President's Guidance of 5 May 2022, *Fact Finding Hearings and Domestic Abuse in Private Law Children Proceedings*. He submitted that this supported the conclusion that this approach could form part of a welfare evaluation as well as part of the court's consideration of whether to order a fact-finding hearing.

50. Mr Devereux also told us that the points now advanced in respect of the separate representation of the children and of their habitual residence had not been raised before the judge below.

Legal Framework

51. The legal framework is not in dispute. In summary, the court's decision is a welfare determination and must give paramount consideration to the welfare of each child as required by section 1(1) of the CA 1989. The court has to decide the extent to which it needs to investigate the facts of the case, including by holding a fact-finding hearing, in order properly to determine what order is in a child's best interests. The court needs to consider all relevant factors, including PD 12J, when determining whether a summary determination is sufficient and what order to make.

52. The current version of PD 12J was updated in May 2022. Its purpose is set out in paragraph 2:

> "The purpose of this Practice Direction is to set out what the Family Court or the High Court is required to do in any case in which it is alleged or admitted, or there is other reason to believe, that the child or a party has experienced domestic abuse perpetrated by another party or that there is a risk of such abuse."

Paragraph 4 states:

> "Domestic abuse is harmful to children, and/or puts children at risk of harm, including where they are victims of domestic abuse for example by witnessing one of their parents being violent or abusive to the other parent, or living in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with and being victims of domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents."

Paragraph 16 requires the court to "determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegation of domestic abuse".

53. Under the heading "Directions for a fact-finding hearing", it is provided:

> "16 The court should determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegation of domestic abuse –"
>
> (a) in order to provide a factual basis for any welfare report or for assessment of the factors set out in paragraphs 36 and 37 below;
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> (b) in order to provide a basis for an accurate assessment of risk;
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> (c) before it can consider any final welfare-based order(s) in relation to child arrangements; or
>
> (d) before it considers the need for a domestic abuse-related Activity (such as a Domestic Violence Perpetrator Programme (DVPP)).
>
> 17 In determining whether it is necessary to conduct a fact-finding hearing, the court should consider –
>
> (a) the views of the parties and of Cafcass or CAFCASS Cymru;
>
> (b) whether there are admissions by a party which provide a sufficient factual basis on which to proceed;

> (c) if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;
>
> (d) whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;
>
> (e) whether the factors set out in paragraphs 36 and 37 below can be determined without a fact-finding hearing;
>
> (f) the nature of the evidence required to resolve disputed allegations;
>
> (g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and
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> (h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.

Guidance on the application of PD 12J was given in *Re H-N*. I deal with this case below.

54. Applications for return orders to a non-Convention State are specifically addressed in Part 3 of Practice Direction 12F, *International Child Abduction*. This states, in paragraph 3.1:

> "The extent of the court's enquiry into the child's welfare will depend on the circumstances of the case; in some cases the child's welfare will be best served by a summary hearing and, if necessary, a prompt return to the State from which the child has been removed or retained. In other cases a more detailed enquiry may be necessary (see *Re J (Child Returned Abroad: Convention Rights)* [2005] UKHL 40; [2005] 2 FLR 802)."

55. The court's approach to the determination of whether to make a summary return order was extensively considered in *Re J* and in *Re NY*. The first, in which Baroness Hale gave the leading speech, involved a non-Convention country while the latter, in which Lord Wilson gave the sole judgment, involved a State that was a Contracting Party to the 1980 Convention.

56. *Re J* is relevant for two reasons. First, Baroness Hale reiterated, at [12], the limited circumstances in which it is appropriate for an appellate court to interfere with a trial judge's evaluative decision when exercising a discretion.

57. Secondly, she gave detailed guidance on the approach which the court should take when dealing with an application for a return order to be made on a summary welfare determination. She identified a number of propositions:

> (i) at [22]: "There is no warrant, either in statute or authority, for the principles of the Hague Convention to be extended to countries which are not parties to it";

> (ii) at [25]: "in all non-Convention cases, the courts have consistently held that they must act in accordance with the welfare of the individual child. If they do decide to return the child, that is because it is in his best interests to do so, not because the welfare principle has been superseded by some other consideration";
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> (iii) at [26]: "the court does have power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits"; and
>
> (ii) at [28]: "It is plain, therefore, that there is always a choice to be made. Summary return should not be the automatic reaction to any and every unauthorised taking or keeping a child from his home country. On the other hand, summary return may very well be in the best interests of the individual child".

Clearly, when deciding what order to make, as Baroness Hale said, at [29], the court's "focus has to be on the individual child in the particular circumstances of the case". However, she set out a number of specific factors.

58. These included:

> (i) at [33]: "One important variable, as indicated in *In re L* [1974] 1 WLR 250, is the degree of connection of the child with each country. This is not to apply what has become the technical concept of habitual residence, but to ask in a common sense way with which country the child has the closer connection. What is his "home" country? Factors such as his nationality, where he has lived for most of his life, his first language, his race or ethnicity, his religion, his culture, and his education so far will all come into this.";
>
> (ii) at [34]: "Another closely related factor will be the length of time he has spent in each country. Uprooting a child from one environment and bringing him to a completely unfamiliar one, especially if this has been done clandestinely, may well not be in his best interests. A child may be deeply unhappy about being recruited to one side in a parental battle. But if he is already familiar with this country, has been here for some time without objection, it may be less disruptive for him to remain a little while longer while his medium and longer time future is decided than it would be to return.";
>
> (iii) at [37], on the relevance of "different legal conceptions of welfare": "Like everything else, the extent to which it is relevant that the legal system of the other country is different from our own depends upon the facts of the particular case. It would be wrong to say that the future of every child who is

> within the jurisdiction of our courts should be decided according to a conception of child welfare which exactly corresponds to that which is current here. In a world which values difference, one culture is not inevitably to be preferred to another … Once upon a time, it may have been assumed that there was only one way of bringing up children. Nowadays we know that there are many routes to a healthy and well adjusted adulthood. We are not so arrogant as to think that we know best.";
>
> (iv) at [38], she referred to the welfare checklist in section 1(3) of the CA 1989.

59. Baroness Hale addressed, at [39], the relevance of differences in legal systems. I set out the paragraph in full:

> "In a case where the choice lies between deciding the question here or deciding it in a foreign country, differences between the legal systems cannot be irrelevant. But their relevance will depend upon the facts of the individual case. If there is a genuine issue between the parents as to whether it is in the best interests of the child to live in this country or elsewhere, it must be relevant whether that issue is capable of being tried in the courts of the country to which he is to be returned. If those courts have no choice but to do as the father wishes, so that the mother cannot ask them to decide, with an open mind, whether the child will be better off living here or there, then our courts must ask themselves whether it will be in the interests of the child to enable that dispute to be heard. The absence of a relocation jurisdiction must do more than give the judge pause (as Hughes J put it in this case); it may be a decisive factor. On the other hand, if it appears that the mother would not be able to make a good case for relocation, that factor might not be decisive. There are also bound to be many cases where the connection of the child and all the family with the other country is so strong that any difference between the legal systems here and there should carry little weight."

60. She returned to the relevance of differences in the respective legal systems under the heading of "Human Rights". She first noted, at [42], that "the unchallenged evidence before the trial judge was that the law in Saudi Arabia treats fathers and mothers differently and in significant respects the mother is in a less favourable position than the father". Interestingly, given her decision that the principles of the 1980 Convention did not apply, she considered, at [43]-[45], the potential relevance of article 20 which is not incorporated into our domestic law but which provides:

> "The return of the child under the provisions of article 12 may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."

She noted that the "importance of article 20 is that it asks whether what might happen in the foreign country would be permitted under those fundamental principles were it to happen here". Were it "incorporated, we would be entitled, though not obliged, to decline to return a child on that ground alone".

61. She went on to comment, at [45]:

> "If we were, therefore, to be applying the spirit of the Hague Convention in a non-Convention case, there would be no reason not to apply the whole of the Hague Convention, including article 20. Any discrimination in the foreign country which was contrary to article 14 of the Convention on Human Rights would allow, but not require, the court to refuse to return the child. This consideration serves to reinforce the view that the legal system in the foreign country cannot be irrelevant to the issue of summary return."

As can be seen, Baroness Hale used this analysis to support her earlier conclusion that the nature of the legal system in the other country cannot be determinative but equally cannot be irrelevant.

62. I would also emphasise that Baroness Hale was, equally clearly, not suggesting that there would not be cases in which the effect on the parent and/or the children caused by differences in legal systems, including the approach to welfare, would be sufficiently contrary to the children's welfare that a summary return order should not be made and, indeed, a return order should not be made after a full welfare inquiry. The impact on the welfare outcome would depend on the weight properly to be accorded to this factor in the circumstances of the particular case.

63. The next case is *Re NY*. The sole judgment was given by Lord Wilson. He added some observations to what had been said in *Re J* but did not depart from the approach set out in that case. In that case, Lord Wilson decided that the Court of Appeal had wrongly substituted a welfare determination for the judge's determination under the 1980 Convention.

64. He noted, at [48], that when the court "is considering whether to make a summary order, the court will initially examine whether the child's welfare requires it to conduct the extensive inquiry into certain matters which it would ordinarily conduct". He picked this point up again, at [49], when. after saying that "the court is likely to find it appropriate to consider the first six aspects of welfare specified in section 1(3)" of the CA 1989, he said that:

> "if it is considering whether to make a summary order, it will initially examine whether, in order sufficiently to identify what the child's welfare requires, it should conduct an inquiry into any or all of those aspects and, if so, how extensive that inquiry should be".

65. Lord Wilson made the same point when dealing with PD 12J. He first said, at [50]:

> "the practice direction explains that harm is suffered not only by children who are the direct victims of domestic abuse but also by children who live in a home in which it is perpetrated. When disputed allegations of domestic abuse are made, the practice direction makes detailed requirements of the court, in particular to consider whether to conduct a fact-finding hearing in relation to them (paragraph 16), whether to direct the preparation of a report by a CAFCASS officer (paragraph 21) and whether to order a child to be made a party and be separately represented (paragraph 24)."

He noted that PD 12J does not expressly apply to an application under the inherent jurisdiction but said:

> "Nevertheless, as in relation to the welfare check-list, a court which determines such an application is likely to find it helpful to consider the requirements of the practice direction; and if it is considering whether to make a summary order, it will initially examine whether, in order sufficiently to identify what the child's welfare requires, it should, in the light of the practice direction, conduct an inquiry into the allegations and, if so, how extensive that inquiry should be."

He again referred to PD 12J, at [59], when giving his reasons for allowing the appeal:

> "Fourth, the court should have considered whether in the light of Practice Direction 12J, an inquiry should be conducted into the disputed allegations made by the mother of domestic abuse and, if so, how extensive that inquiry should be: see para 50 above. The judge had made no findings about them. Instead, in accordance with *In re E (Children)* [2012] 1 AC 144, he had, for the purposes of the claim under the Convention, made a reasonable assumption in relation to the maximum level of risk to the child arising out of any domestic abuse to be perpetrated by the father and had considered that such risk would be contained within acceptable limits by undertakings offered by the father, the enforceability of which in Israel the judge had not explored. Consideration should therefore have been given to whether, in a determination to be governed by the child's welfare, the judge's approach to the mother's allegations remained sufficient.

66. All these references demonstrate that a judge has a discretion when deciding the extent of any welfare inquiry including the extent to which allegations of domestic abuse require investigation and determination. It is also relevant, in the light of Mr Setright's submission as to the judge incorporating aspects of the *Re E* approach into his analysis, to note that Lord Wilson did not say that adopting that approach for the purposes of a welfare determination was wrong. He only said that, when making its substituted welfare determination, the Court of Appeal should have considered whether that approach "remained sufficient".

67. As noted above, the judge set out Cobb J's summary of *Re NY* from *J v J*. I repeat this summary, in part because it demonstrates the matters the judge had in mind when making his decision. Cobb J summarised the "eight … linked, questions" which Lord Wilson suggested, at [55], that "the Court of Appeal should have given (but did not give) at least some consideration":

> "[38](i) The court needs to consider whether the evidence before it is sufficiently up to date to enable it then to make the summary order ([56]);
>
> ii) The court ought to consider the evidence and decide what if any findings it should make in order for the court to justify the summary order (esp. in relation to the child's habitual residence) ([57]);
>
> iii) In order sufficiently to identify what the child's welfare required for the purposes of a summary order, an inquiry should be conducted into any or all of the aspects of welfare specified in *section 1(3)* of the *1989 Act*; a decision has to be taken on the individual facts as to how extensive that inquiry should be ([58]);
>
> iv) In a case where domestic abuse is alleged, the court should consider whether in the light of *Practice Direction 12J*, an inquiry should be conducted into the disputed allegations made by one party of domestic abuse and, if so, how extensive that inquiry should be ([59]);
>
> v) The court should consider whether it would be right to determine the summary return on the basis of welfare without at least rudimentary evidence about basic living arrangements for the child and carer ([60]);
>
> vi) The court should consider whether it would benefit from oral evidence ([61]) and if so to what extent;
>
> vii) The court should consider whether to obtain a Cafcass report ([62]): 'and, if so, upon what aspects and to what extent';
>
> viii) The court should consider whether it needs to make a comparison of the respective judicial systems in the competing countries – having regard to the speed with which the courts will be able to resolve matters, and whether there is an effective relocation jurisdiction in the other court ([63])."

68. In *Re H-N*, extensive guidance was given in the judgment of the court (Sir Andrew McFarlane P, King and Holroyde LJJ) on the proper approach to the application of PD 12J. In particular, it was said, at [37]:

> "The court will carefully consider the totality of PD 12J, but to summarise, the proper approach to deciding if a fact-finding

> hearing is necessary is, we suggest, as follows:
>
> (i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD 12J, para 5).
>
> (ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD 12J, para 16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.
>
> (iii) Careful consideration must be given to PD 12J, para 17 as to whether it is "necessary" to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.
>
> (iv) Under PD 12J, para 17(h) the court has to consider whether a separate fact-finding hearing is "necessary and proportionate". The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in The Road Ahead."

The court further said, at [139]:

> "Domestic abuse is often rightly described as pernicious. In recent years, the greatly improved understanding both of the various forms of abuse, and also of the devastating impact it has upon the victims and any children of the family, described in the main section of this judgment, have been most significant and positive developments. The modern approach and understanding is reflected in the "General principles" section of PD 12J, para 4. As discussed at paras 36-41 above that does not, however, mean that in every case where there is an allegation of, even very serious, domestic abuse it will be either appropriate or necessary for there to be a finding of fact hearing, so much is clear from the detailed guidance set out in paras 16-20 of PD 12J and, in particular, at para 17: "(g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and (h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.""

69. The observations in *Re H-N*, and indeed PD 12J itself, make clear the established understanding that domestic abuse is "pernicious". They also make clear that this does not mean the court must undertake a finding of fact hearing in every case in which domestic abuse is alleged.

70. The approach set out in *Re H*-N is consistent with that set out by Lord Wilson in *Re NY*, at [50], namely that, when the court is considering whether to make a summary order, "it will initially examine whether, in order sufficiently to identify what the child's welfare requires, it should, in the light of the practice direction, conduct an inquiry into the allegations and, if so, how extensive that inquiry should be".

Determination

71. In my view, there is no need for further guidance because *Re J* and *Re NY* contain the relevant, and sufficient, guidance to the court for the purposes of determining an application for the return of a child to a non-Convention State. It is a welfare determination in respect of which an array of factors will be relevant and which the court must balance when determining what order to make. As Lord Wilson said in *Re NY*, part of that exercise will include the court determining, in respect of all relevant matters, but in particular in respect of the matters set out in section 1(3) of the CA 1989 and any allegations of domestic abuse, whether, in order sufficiently to identify what the child's welfare requires, the court should conduct an inquiry into any or all of those matters and, if so, how extensive that inquiry should be.

72. I would, therefore, reject Mr Setright's submission that the court was required to undertake a fact-finding hearing, or further investigation, into the mother's allegations of domestic abuse before making a return order. Neither the absence of any fact-finding inquiry in respect of the mother's allegations by the Dubai courts nor the fact that those allegations would not be relevant in any child proceedings in Dubai meant that the English court must undertake such an inquiry before determining whether to make a return order. As in all welfare decisions, the extent of the court's inquiry and the court's determination of what order to make will depend on the facts of the particular case. As Baroness Hale said in Re J, at [37], in respect of "different legal conceptions of welfare":

> "*Like everything else*, the extent to which it is relevant that the legal system of the other country is different from our own depends upon the facts of the particular case." (my emphasis)

73. The judge plainly had a discretion both as to the extent of the welfare inquiry and as to whether to make a return order. Mr Setright has to establish that, in either respect, the exercise by the judge of his discretion was flawed in some material respect.

74. The principal issues in this case are, therefore: (a) whether the judge failed properly to follow the guidance referred to above and/or PD 12J; and (b) whether, for that or for any of the other reasons advanced on behalf of the mother, the judge's welfare decision was flawed.

75. (a) The first question is whether, to adapt what Lord Wilson said in *Re NY*, at [59], Poole J's "approach to the mother's allegations (was) sufficient". Did he sufficiently consider whether, "in the light of Practice Direction 12J, an inquiry should be conducted into the disputed allegations made by the mother of domestic abuse" and was he wrong to decide that no additional inquiry was required to enable him fairly and properly to determine whether a return order was in the children's best interests.

76. In my view, the judge was entitled to decide that he could fairly and properly determine whether to make a return order after a summary welfare assessment. He had a significant amount of material available to him and was entitled to decide that he did not have to undertake a fact-finding hearing or any further investigation into the mother's allegations. He was very well aware of the nature of those allegations and there is nothing which would support the conclusion that he failed to give them proper weight when making his decision.

77. The judge did not expressly conduct his analysis by reference to PD 12J but this reflected the way in which the case was argued before him. The mother's case was not based on any submission that the judge must apply PD 12J. It was based on the broader submission that a fact-finding hearing in respect of the allegations of abuse and "a full welfare assessment" were required before the court could determine whether to make a return order. It is not, therefore, surprising that the judge did not expressly refer to the provisions of PD 12J beyond the reference to them in *Re NY*.

78. However, it can be seen that the judge did carry out the exercise required by PD 12J, namely, as set out in paragraph 16, "whether it is *necessary* to conduct a fact-finding hearing in relation to any disputed allegation of domestic abuse" (my emphasis) including "before it can consider any final welfare-based order(s) in relation to child arrangements". The judge considered whether such a hearing was necessary and concluded that it was not. Despite Mr Setright's submissions, the judge's decision was not vitiated by any material flaw. He did not ignore any material factor nor take into account any irrelevant factor nor can his decision be said to have been wrong. Mr Setright can point to passages in the judgment which appear to misstate the extent of the mother's allegations but, when the judgment is considered overall, it is clear that, as submitted by Mr Devereux, the judge understood the nature and seriousness of the mother's allegations and sufficiently analysed whether further investigation and/or a fact-finding hearing were necessary.

79. Accordingly, in my view, the judge did not fail properly to consider or apply the guidance set out in the cases referred to above or the provisions of PD 12J. He sufficiently analysed the relevant factors in the case, including the mother's allegations of domestic abuse, and was entitled to decide to make a summary welfare determination for the reasons he gave.

80. (b) Was the judge's welfare analysis flawed?

81. I first deal with the submission that the judge's decision was flawed because, as part of his analysis, when considering "the risks to the children in the context of a return to E", he adopted the *Re E* approach to the assessment of those risks. In my view, the judge was entitled to use this approach. He was, as Peter Jackson LJ observed during the hearing, doing no more than evaluating the evidence to consider the maximum level of risk. He could have done this as part of his analysis without referring to *Re E* and no objection could have been taken. The references in both *Re J* and *Re H-N* to the Hague Convention and *Re E* do not support Mr Setright's submission; indeed, they at least suggest that it is wrong. Further, it appears that the judge was invited to adopt this approach by the mother's then counsel.

82. Next, did the judge fail properly to take account of the absence of a relocation jurisdiction? My answer is, again, that he did not. The judge expressly considered

this factor and weighed it carefully in the balance because, as he said, he was concerned by it. In addition, contrary to Mr Setright's submissions the judge was entitled, and probably even required, to analyse the merit of any such application. He was able to undertake this analysis on the basis of the evidence available to him and, again, reached a decision that was open to him.

83. In respect of the judge's welfare decision, it is right again to consider whether the judge has sufficiently considered the mother's allegations of abuse. The judge had to balance a number of factors and I have, again, come to the conclusion that there is nothing to support the submission that his approach to them was flawed. These allegations formed a significant part of his analysis. As referred to above, it is clear that the judge understood the nature and seriousness of the mother's allegations. There is no basis on which this court could conclude that he insufficiently analysed or gave insufficient weight to this part of the mother's case.

84. It can also be seen that the judge clearly took into account all the evidence when reaching his decision. This includes the evidence from the Cafcass Officer and as to the children's wishes and feelings. His evaluation of that evidence does not go beyond that which he was entitled to undertake and does not disclose any flawed conclusions, as submitted on behalf of the mother. The children's voices were heard and were part of the judge's analysis.

85. For the avoidance of doubt, I would add that it is too late to raise any argument in respect of the issues of habitual residence and the independent representation of the children. In any event, they lack substance. As to the former, the relevant issue was the factual question of the respective connections the children had with England and with Dubai not the legal issue of where they were habitually resident. The court's approach to the welfare determination would not have been materially different. As to the latter, there was no reason for the judge to consider that the children might need to be separately represented.

86. In summary, therefore, the judge has reached a welfare determination that was open to him and which he has sufficiently explained and justified. This includes his determination as to the issue of contact which was included in the Settlement Agreement. Indeed, the Settlement Agreement was a sensible precondition for the judge to require, as set out in his judgment.

87. Accordingly, in my view, for the reasons set out above, the mother's appeal should be dismissed.

Lord Justice Peter Jackson:

88. I agree.

Lord Justice Warby:

89. I also agree.