Neutral Citation Number: [2024] EWCA Civ 131

Case No: CA-2023-001835

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mr Paul Hopkins KC sitting as a Deputy High Court Judge
FD22P00629

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2024

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE BAKER
and
LADY JUSTICE ANDREWS

- -

R AND Y (CHILDREN)

- -
- -

Mansoor Fazli (instructed by **Advocate**) for the **Appellant**
Mark Jarman KC (instructed by **Brabners**) for the **Respondent**

Hearing date : 19 December 2023

- -

Approved Judgment

This judgment was handed down by the judges 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 10:30am on 28 February 2024.

LORD JUSTICE BAKER :

1. For the reasons set out below, I have concluded that this appeal against an order for the return of two children to the United Arab Emirates in the care of their father must be allowed. The consequence will be, if my Ladies agree, that the future arrangements for the care of the children will have to be reconsidered by another court.

2. I have reached this conclusion with some regret. Final decisions about the children's future will be further delayed. Delay in making such decisions is always harmful to children and it is clear that these children have been adversely affected by the delays that have occurred up to now. It should also be said at the outset that the judge at first instance carried out his task diligently and conscientiously. The case raised a number of difficult issues, which for the most part he resolved in ways that could not possibly be challenged in this Court. But he went astray in two crucial respects – first, in treating the application as one for the "summary return" of the children and, secondly, his treatment of serious findings of abuse which he made against the father.

3. This judgment will focus on those two issues. It would be unnecessary and disproportionate to cite extracts from the two lengthy judgments which he delivered in the proceedings save for those passages relevant to the appeal.

Background

4. The mother was born and brought up in an Eastern European country and is a citizen of that country. The father was born in England and is a UK citizen. They met in the United Arab Emirates where both were working. After marrying in England in 2012, they returned to the UAE where they lived together for the next ten years. R, a boy, was born in 2013 and Y, a girl, in 2015. They are both citizens of the UK and the Eastern European country.

5. In 2016, the parents jointly purchased a property in the father's home town in the north of England, hereafter referred to as X. They used the property as a holiday home and for the purposes of visiting the children's wider paternal family who live locally.

6. For some years, there had been difficulties in the parents' marriage. In August 2022, while the family was staying on holiday in X, the mother consulted a solicitor about her immigration status. On the following day, the father informed the mother of his intention to end their relationship. On the same date, the mother contacted the police and made a number of allegations against the father, including financial abuse, controlling and coercive behaviour, sexual assault and rape. The father was arrested and in the course of an interview denied the allegations and made several cross-allegations against the mother concerning her behaviour, lifestyle, and alcohol abuse. He was released on police bail.

7. Following these developments, the family did not return to the UAE. The mother informed the children's school in the UAE that they would not be returning. In September, they started attending a school in X. On 3 October 2022, the father started proceedings for an order under the High Court inherent jurisdiction, seeking the summary return of the children to the UAE. At a preliminary hearing, without notice to the mother, on 14 October, a deputy judge made a number of case management directions and a tipstaff's passport order. That order was served on the same day and

the mother's and children's passports seized. At a return hearing before Sir Jonathan Cohen on 21 October, the court made an order approving interim arrangements for the children to remain in the mother's care with contact to the father and made further case management directions including for an assessment by a Cafcass officer.

8. On 22 October, the mother applied for leave to remain in the UK. In her application, she referred to the allegations of abuse and asserted that she was the children's primary carer. At a further hearing before Lieven J on 9 November, the court made an order for the father to have overnight staying contact. The judge considered the Scott Schedule filed by the mother setting out her allegations of domestic abuse. She held, and recited in the court order, that the totality of the allegations was disproportionate and directed the mother's solicitor to review them and focus on those relevant to the issues to be determined at the final hearing. The order also recited that no application had been made for the instruction of an expert under Part 25 of the Family Procedure Rules and drew the parties' attention to the judgment of Poole J in *Re A and B (Children: Return Order: UAE)* [2022] EWHC 2120 (Fam) in which he had set out the law and arrangements "relating to expatriate families living in the UAE". Meanwhile, following the police investigation, the family had been referred to social services who had carried out a child and family assessment. On 1 November, the children were made subject to a Child in Need plan.

9. In January 2023, the father returned to the UAE alone. Shortly afterwards, the mother took up residence with the children at the family's English property and changed the locks. Later that month, the Cafcass officer filed a preliminary report summarising the children's wishes and feelings, which at that stage were unequivocally in favour of returning to the UAE, and proposing that there should be a fact-finding hearing.

10. On 26 January, the mother filed an application for an injunction under the Family Law Act 1996 together with an application for a litigation funding order and interim maintenance. That application was resolved on the basis of undertakings given at a hearing before Recorder Allen KC on 2 February at which further case management directions were given, including for hair strand testing.

11. On 14 February 2023, the proceedings under the inherent jurisdiction came before Mr Paul Hopkins KC sitting as a deputy judge of the Family Division (hereafter "the judge"). Having heard further from the Cafcass officer as to why she could not make any recommendation for the long-term child arrangements without findings on the parties' respective allegations, the judge agreed that there should be a fact-finding hearing and made further case management directions in preparation. There were further procedural difficulties, including regarding the mother's representation and attempts to instruct a qualified legal representative ("QLR"), which were subsequently summarised by the judge in his fact-finding judgment (paragraphs 74 to 82).

12. In the event, when the fact-finding hearing started on 9 May 2023, both parties were represented by solicitor and counsel. The focus of the hearing was the amended Scott Schedule prepared on behalf of the mother. The hearing continued over four days, after which judgment was reserved and handed down on 22 May. Although they are not the subject of this appeal – and, importantly, have never been the subject of *any* appeal – the findings made in that judgment lie at the heart of this appeal. It will therefore be necessary later in this judgment to set out in some detail the findings which the judge made, the findings which he declined to make, and his underlying reasons. At this stage,

I simply record that the judge made some, but not all, of the findings sought by the mother, including findings of physical abuse of herself and the children, psychological abuse, and financial control. At the end of the hearing, the judge listed the case for a final hearing in August 2023 and made a series of case management directions, including further statements from the parties and a supplemental report from the Cafcass officer. The child arrangements order made by Lieven J in November was extended until the final hearing.

13. On 28 June 2023, the mother was granted leave to remain in the UK for 30 months. On 17 July 2023, the Cafcass officer filed a supplemental report in which she recommended that the court order the return of the children to the UAE. On 31 July, a directions hearing took place before the judge.

14. The final hearing took place remotely over three days in August 2023. On this occasion, the mother was not represented, although she had the assistance of a McKenzie friend whom the judge permitted, exceptionally, to ask questions and make submissions on the mother's behalf. On 1 September, the judge announced his decision that the children should return to the UAE. On 4 September, he handed down the approved version of his final judgment and made an order setting out detailed arrangements for the future, including provision for contact with the mother, and a direction that, prior to the return of the children to the UAE, the parties must enter into a binding and enforceable settlement agreement in the UAE in accordance with the details set out in a schedule to the order.

15. On 22 September, the mother filed a notice of appeal. Meanwhile, the settlement agreement to facilitate the children's return was drafted by lawyers in the UAE, Diana Hameed Associates, who, as I shall describe below, had been involved in the final hearing. On 25 October, Moylan LJ granted a stay of the return order pending determination of the application for permission to appeal. On 16 November, Moylan LJ granted permission to appeal and extended the stay until the appeal was determined. He expressed his reasons in these terms:

> "The mother's grounds of appeal rely largely on a number of alleged procedural irregularities. However, I grant permission to appeal because I consider that the proposed appeal has a real prospect of success in particular in respect of the judge's approach and his substantive decision. It is arguable that the judge adopted the wrong legal approach having regard to the fact that his decision was, in its effect, a long-term welfare decision and not simply a decision on whether to make a summary return order. It is also arguable that the judge's welfare analysis was flawed and his decision wrong."

16. Before considering the grounds of appeal, I shall set out the relevant parts of the two lengthy judgments delivered in the proceedings.

The fact-finding judgment

17. The fact-finding judgment, which extended over 253 paragraphs, is well-structured and extremely thorough. After an introduction, the judge summarised the parties' positions, noting that the Scott Schedule prepared by the mother had been through several

iterations, that in order to make the hearing more manageable, the mother had not pursued various findings whilst not abandoning them, and that the father, whilst denying the vast majority of the allegations, had made some general concessions as to poor behaviour in the past and accepted that he had "contributed to the dysfunctional relationship with the mother to which the children were exposed". After setting out the relevant legal principles, the judge then summarised the background of the case and the history of the litigation.

18. The judge proceeded to a summary of the evidence, starting with the professional witnesses. He set out some observations from the social worker's report, including that she had felt that the father's behaviour had been "worrying" and that he had withheld information from her to "distort the wider context" and that he had "done this to control the wider circumstances".

19. The judge then summarised the evidence of the Cafcass officer. He noted that both children had said that they wanted to return to the UAE and that they missed their life and friends there. The Cafcass officer added:

> "It is clear they have a strong sense of belonging to the UAE, and by comparison X feels unfamiliar and unstable to them."

The judge recorded Y's comments to the Cafcass officer in more detail, noting that she had said contradictory things about which parent she would prefer to live with. The Cafcass officer cited things said by Y which provided support to the mother's allegations of physical abuse but also corroborated the father's allegation about the mother's excessive drinking. The judge quoted the officer's concern about

> "the functioning of the children's relationships with each of their parents and what exposure to potentially harmful and toxic adult behaviours they may have experienced"

and that they

> "have been drawn into and made aware of adult disputes from which they should have been protected".

This led the Cafcass officer to conclude that, beyond their clear wish to return to the UAE, the children's comments were in many ways unreliable. In the light of that observation, the judge indicated that he had not relied on the children's comments in reaching his findings.

20. The judge went on to record the Cafcass officer's observation that the children:

> "(a) display clear indicators of having sustained some emotional harm as a result of exposure to harmful adult behaviour; (b) have felt hopelessly caught in the middle of the highly acrimonious and volatile separation of their parents at the same time as being uprooted from their home, school and friends; (c) have both experienced a difficult adjustment; (d) are likely to have been emotionally harmed through this and are now considered vulnerable by social services as a result."

The judge continued (at paragraph 103):

> "The Cafcass officer goes on to state as follows: (a) If the mother's allegations in respect of the father are accurate this would "…present a significant concern for both her and the children's safety in the care of their father in the UAE"; (b) her understanding of the situation in UAE is that there would be little scope for her allegations to be investigated there; (c) there would be ongoing "…. potential risk to the children in this scenario if they were to remain unassessed."

It was for this reason that the Cafcass officer had concluded that she was unable to provide a comprehensive welfare assessment in the absence of a clear factual basis being determined by the court, adding that the allegations were "high risk" in nature and required proper determination.

21. At paragraphs 109 to 130 the judge set out detailed observations about the parents as witnesses. Neither had been a satisfactory witness. He described the mother as "hesitant …. highly defensive and minimising". He noted some changes and inconsistencies in her evidence and concluded that she was "a poor witness in relation to a number of aspects of her account." The father had appeared insightful in parts of his evidence and accepted that he should behaved differently, although "some concessions were then followed in his oral evidence either by qualification or deflection". There was also "a significant lack of consistency in relation to the fundamental way in which he put his case against mother". In some respects, he had "pursued an agenda to unsettle the mother by his actions."

22. Before making findings on the mother's specific allegations, the judge set out some conclusions on "a number of important contextual points". First, he accepted that there had been "an element of evidence gathering on mother's part, at least from 2016/17 onwards" and therefore "an 'agenda' at play at times when some of the evidence before the court was created or recorded". By way of example, he cited the fact that the mother had made a number of video and audio recordings of the father which were "covert in nature". These included recordings of her questioning the children in which she had asked leading questions. Secondly, he made some observations about the parties' respective temperaments and attitudes. He described the mother as "more measured and more in control … a bright, articulate and contemporary woman". In contrast, the father was "somewhat 'old-fashioned' in his attitudes towards women" and "regarded the parties' assets and income as fundamentally *his* assets and his income and to be approached on *his* terms." Thirdly, he considered the role alcohol played in the parents' lives. He found it clear that "until, relatively recent, alcohol has figured as a daily part of mother's lifestyle" which "suggests a degree of dependency". The father had been less minimising than the mother about drinking, but the judge "found his evidence about drinking before driving in UAE troubling" and noted that he had a conviction in 2005 (presumably in England) for driving with excess alcohol. He added that, "on any view, the father was capable of appalling behaviour when under the influence of alcohol".

23. The judge then moved on to consider the specific findings sought by the mother, which came under the following headings and which he considered in the following order: physical abuse; psychological abuse; sexual abuse; financial abuse; physical abuse of the children; alcohol abuse; inappropriate sexual behaviour, and "recent controlling

behaviour". In a careful assessment of the evidence, he found some of the allegations proved but not others. Amongst the allegations not proved were all of the allegations of (1) sexual abuse, which he described as "the most serious allegations raised by the mother" which had "attracted my most anxious reflection"; (2) sexually inappropriate behaviour, and (3) "recent controlling behaviour". The allegations proved included (1) most of the allegations of physical abuse of the mother; (2) some of the allegations of physical abuse of the children; (3) some aspects of the allegations of psychological abuse, and (4) some aspects of the allegations of financial abuse.

24. It is necessary to set out the findings made against the father in more detail. In doing so, I shall follow the order in which I have summarised them in the preceding paragraph rather than the order in the judgment which followed the order in the Scott Schedule.

Physical abuse of the mother

25. First, the mother sought "an overarching finding that the father has serious anger management issues". The judge found that "the father has an issue in managing his temper and anger in a domestic setting and was capable of initiating aggression and violence". He added, however, that "context is, as ever, important" and rejected the mother's claim, which he described as an exaggeration, that the father had become violent and angry towards her and the children whenever he became upset or suffered a minor inconvenience. Identifying the context of the father's behaviour, the judge found that:

> "the deteriorating marriage was a significant source of stress and frustration that he found challenging to manage, especially in the context of excessive alcohol use by him."

He also concluded that:

> "in a general sense that he found aspects of caring for the children at times challenging".

He added that the mother too had been capable of aggressive behaviour on some occasions, citing in particular an occasion when she had bitten his arm.

26. Secondly, he made a finding that, in 2017, the father had assaulted the mother in the presence of R, who was then aged 4, by placing her in a headlock while twisting her left arm and choking her with his right arm. The judge accepted the mother's evidence that she had taken several weeks to recover from what the judge described as "this unpleasant injury".

27. Thirdly, he made findings that, during an argument in May 2017, the father had thrown the mother against the walls and the furniture; that as a result she had locked herself in the bedroom; and that the following morning he had evicted her and Y, then aged two, from the property in their pyjamas, causing them to wait in a neighbour's house until the police arrived. The mother's allegations were supported by photographs and a medical report which recorded that she had bruises on her torso and limbs, which the judge described as a "relatively extensive set of bruises".

Physical abuse of the children

28. Under this heading, the mother first alleged that the father was impatient with the children and often smacked them so that red handprints marks could be seen on their bodies. The father responded that both parents smacked the children but denied that he smacked them sufficiently hard to leave marks. The judge accepted the mother's account and found that smacking the children in the way described would have been "obviously painful for them".

29. In addition, the judge made findings about specific incidents of physical abuse of the children. He accepted an allegation by the mother that in 2017 the father had hit Y (aged two) on the head with a phone because she had made it dirty. He also accepted her allegation that in 2022 the father had threatened R with a fork before pressing it into his hand causing him to cry out. On the other hand, the judge rejected other allegations by the mother that in 2017 the father had kicked R in the stomach, that in 2021 he had burned Y with a cigarette lighter, that he had deliberately tripped Y up, or that he had bitten her finger.

Psychological abuse

30. Under this heading, the mother first made what the judge described as an overarching allegation that the father verbally abused her on a daily basis, frequently calling her a "stupid dickhead" at home and in front of others. The father accepted that he had been thoughtless and hurtful at times and the judge had "no hesitation in accepting that the father was capable of verbally abusing the mother in a shameful way." On the other hand, he thought it likely that the mother's contention that this occurred on a daily basis was an exaggeration. He added that the mother was also capable of being verbally abusive to the father, noting that on one occasion in the children's presence she had described the maternal grandmother as a "cunt".

31. Next, the mother alleged that, in the course of an argument in the summer of 2018 when the children were in the house, the father, when intoxicated, had threatened to smash her head against a wall and bury her in the driveway. In the course of this altercation, the police had been called and made notes which provided some corroboration of the mother's account. According to the police log, however, the mother had not wanted the father to leave the property. The judge made a finding that the father had made the threats alleged by the mother but that he had done so when drunk with no intention of carrying them out. He was not satisfied that the mother was fearful as a result of the father's threats.

32. Finally, the judge accepted the mother's allegations that the father had told her to "fuck off back to [her home country]" although he rejected her allegations of the context in which this had been said. This finding appeared in the section of the judgment dealing with physical abuse, but it seems to me that it is part of the pattern of ill-treatment described under the heading of psychological abuse.

Financial abuse

33. In setting out his findings under this heading, the judge noted that this was not a case where the mother was making allegations that all aspects of her life were controlled by the father. He described her case as "rather nuanced". It was accepted by the father that he had a high degree of control over the management of the family finances. The crux of this issue was whether this regime of control and direction of the family finances

was controlling in an abusive sense. The judge found that the father exercised a "very significant degree of direct control" over the finances and that this "should be seen through the prism of his belief system, namely that it is his business that in his perception generates *his* income, *his* property in the UAE and in England, his cars and so on." He reached the following conclusion:

> "it may well indeed have been the case that the mother had financial expectations that exceeded their capacity and she sought for them to live beyond their means. However, I am equally satisfied that the father exercised a degree of unhealthy control over her in relation to finances. He held the financial 'whip hand' which he would use in the course of arguments with her. I am satisfied that this would have had a disempowering effect on her and was, to a degree, abusive. The impact of this control must also be seen in the context of the culminative impact on her of the other findings of abuse set out in this judgment."

He added, however, that this finding of financial control was "towards the less serious end of the spectrum".

The Cafcass analysis and recommendation

34. Before considering the second, welfare, judgment, I must summarise the supplemental report of the Cafcass officer dated 17 July 2023. It is clear from the judgment that the judge attached considerable weight to her analysis and ultimately followed her recommendation.

35. At the start of the report, the Cafcass officer summarised the fact-finding judgment in the following paragraphs:

> "3. I received the court's judgment dated 22/05/23, which, in summary, declines to make findings of significant coercive and controlling abuse, and sexual abuse. A finding of financial abuse was made, illustrating that the father held an 'unhealthy' level of control over the family finances, but caveated this as being on the 'less serious end of the spectrum' of controlling abuse.
> 4. The court's judgement sets out that both parents were capable of initiating aggression towards one another and have at times been mutually verbally abusive. Alcohol has likely been an exacerbating factor in terms of the parents' abilities to manage the deterioration in their relationship."

36. Pausing there, it is striking that the Cafcass officer made no explicit reference to the findings made by the judge that the father had physically abused the mother and the children. Her interpretation of the findings about violence was that the judge had concluded that "both parents were capable of initiating aggression towards one another".

37. The Cafcass officer continued to report her impressions of the children following a further meeting in July 2023. She noted a marked difference in both children from her meeting with them in December 2022. Y was still expressing a wish to return to the UAE which she considered to be her true home. She reported that her mother had told her "lots of bad things" about her father, leading the Cafcass officer to observe that she still presented

> "as a child who has become very much embroiled in the highly conflicted and difficult relationship breakdown between her parents, becoming involved in matters from which she should have been better shielded".

So far as R was concerned, the Cafcass officer reported that he

> "presented quite differently from our last meeting, and seems to have matured significantly. He now appears to carry the weight of the world on his shoulders and seemed to choose his words very carefully throughout our discussion."

He still missed his home in the UAE but had made friends in X and said that he had begun to feel that it could equally be his home now. He told her that he had found life difficult and felt caught in the middle of his parents' views. He said he didn't mind either way what happened and wanted the court to make a decision on his behalf. The Cafcass officer recorded that both children had shared things which demonstrated that they continued to be drawn into their parents' dispute. She concluded that the mother was largely responsible for this. The mother had told her unequivocally that she would not return to the UAE regardless of the court's decision and had shared that intention with the children.

38. The Cafcass officer observed that the court was faced with a choice as to which option was likely to be the least harmful to the children. She held concerns about their long-term wellbeing whichever option was preferred. The key concerns for the children remaining in the UK centred primarily around the mother's "inability to shield the children from adult disputes and playing her part in ensuring that their paternal relationships are properly promoted". Whereas the mother continued to hold entirely negative views about the father while being "unable to take accountability for any of her own harmful behaviours", the father was "able to offer some, albeit limited self-reflection about his part in the harm which the children have sustained as a result of their exposure to parental dysfunction and conflict" and appeared to hold "a greater understanding than the mother about the importance of the children maintaining close relationships with both parents wherever they live."

39. The Cafcass officer's main concern about the children returning to the UAE centred around the significant change in their relationship with their mother who had been their primary carer, given her firm intention not to set foot in the country again. The Cafcass officer expressed some scepticism about the validity of the mother's objections:

> "I understand why a return to a patriarchal society where she would enjoy fewer rights than the father, having emerged from a relationship where she was victim of financially controlling behaviour might be an unwelcome prospect for the mother. I am

> however mindful of the fact that [she] chose to make UAE her home of her own accord before meeting and marrying the father, with this being the location where the couple met. [She] was able to have a life of independence there prior to her marriage, and presumably could do so again following their separation, with the assurances from the father that it would be safe and legal for her to do so."

In passing, one notes again the Cafcass officer's focus on the finding of financial control rather than the judge's other findings about the father's abusive conduct.

40. The Cafcass officer expressed her final conclusion in these terms:

> "Ultimately, my recommendation for the children rests on where I feel they would most likely be afforded the opportunity to have all their important relationships facilitated and promoted to the best standard. My assessment is that this would be in UAE, either under a shared care arrangement with both parents living in separate houses, or under the primary care of their father, and spending holidays with their mother. I am concerned that the children remaining in X under the primary care of their mother is restrictive for them in terms of how frequently their father can travel back to the UK to visit them, given the responsibilities of his position as director of his own business, and the family finances. The mother is neither financially solvent enough nor willing to promote trips to the UAE for the children to spend time there."

The welfare judgment

41. The second judgment was as long, if not longer, than the first. In preliminary remarks, the judge alluded to the fact that the mother had been unrepresented at the hearing but assisted by a McKenzie friend, adding that he was "satisfied that the father's case was comprehensively tested and that the mother's case was fully developed in the course of the final hearing." He then summarised the parties' respective positions, noting that the father "continues to seek the summary return of the children to the UAE" and that the mother continued to oppose their return, and stated that she would not return to that country even if the court ordered the children's return, at least while she remains married to the father (divorce proceedings having been started in this country). The judge then set out his reasons for refusing the mother's application for an adjournment made at the outset of the hearing to allow her to obtain legal representation and for a legal services payment order. In doing so, he observed that "these summary proceedings have been very long and drawn out". Next, he explained what had happened about the translation of the evidence (an interpreter had been provided but released when it became apparent that the mother did not require her services) and the abortive attempts to obtain a QLR. He then referred briefly to his reasons for refusing two applications made by the mother to adduce further evidence from professional witnesses relating to Y's educational needs.

42. The next heading in the judgment was "Relevant Law – the legal framework in England and Wales". Under this heading, the judge set out the principles to be applied on an application for the summary return of a child to a non-Hague Convention country. He did so by citing a passage in the judgment of Poole J in *Re A and B (Children: Return Order: UAE)* [2022] EWHC 2120 (Fam) in which he quoted from the judgment of Cobb J in *J v J (Return to Non-Hague Convention Country)* [2021] EWHC 2412 (Fam), which in turn quoted extensive passages from the judgment of Baroness Hale of Richmond in the leading case on this issue, *Re J (A Child) (Child Returned Abroad: Convention Rights)* [2005] UKHL 40, and the judgment of Lord Wilson in *Re NY (A Child)* [2019] UKSC 49. The citations from Baroness Hale's judgment included the following observations:

- "…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" (paragraph 25).

- "… 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" (paragraph 26).

- " … the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case" (paragraph 32).

43. The judge then considered the legal position in the UAE. With the consent of the parties, and following the steer provided by Lieven J in at the hearing in November 2022, he adopted the summary of the law in the judgment of Poole J in *Re A and B (Children: Return Order: UAE)*, supra, which had been based on the expert opinion of a lawyer based in the UAE, Ms Diana Hamade. In addition, in circumstances in which it is unnecessary to explain here, Ms Hamade was asked by the judge in the course of the final hearing in this case to provide a supplemental opinion on a range of issues, in particular as to the practical arrangements for obtaining a judgment of a court in UAE reflecting an agreement between parties as to future child arrangements and the position of the mother should she return to the UAE. Her evidence was accepted by the judge and contributed to his ultimate decision, but, as it does not impinge on the issues at the heart of this appeal, it is unnecessary to set it out in this judgment.

44. The judge then identified some factual matters which had occurred, or had become more prominent, since the fact-finding hearing. In particular he considered evidence about Y's educational progress which had led to concerns that she may be developmentally delayed. He noted that "the strength of feelings on the part of each parent towards the other is in no way diminished".

45. He then set out in considerable detail the written and oral evidence given by the Cafcass officer, including those passages from her report cited above. Amongst the passages from her oral evidence cited in the judgment, was the following observation:

> "In relation to the court's fact-finding judgment, [she] felt that, whilst both parents accepted the outcome, neither of them agreed with all aspects of it. She felt that the judgment explored the "power dynamic" between the parents. She felt that whilst there was a finding against the father in relation to past finances, she did not form the view that this was a "pattern" that extended to all aspects of his conduct towards her. The judgment coincided with her own view that each parent was capable of behaving badly towards the other, to which the children had been exposed."

As to the findings relating to physical chastisement, the Cafcass officer was satisfied that the father had gained insight and had been candid about what had happened. She pointed out that the children had not indicated that they were frightened of him. She did not "shy away" from his past behaviour but remained of the view that her recommendation was the least harmful outcome in what she described as a "finely-balanced case".

46. The judge then made a series of further findings relating to the UAE, namely whether there were any ongoing criminal proceedings involving the mother, the prospect of her being arrested if she returned there, her visa position, and the home and school arrangements for the children. He made findings about the mother's attitude to contact with the paternal family and to involving the father in decisions about the children. All of these matters were relevant to his decision and were carefully considered.

47. The judge started the concluding section of the judgment with these words:

> "I remind myself again of the fundamental principle that the children's welfare is my paramount consideration. I must have regard to the welfare checklist within section 1(3) Children Act 1989. I have to decide whether to order summary return to the UAE or whether a further welfare enquiry and assessment should be made whilst the children remain in this jurisdiction."

48. He then summarised the features he considered important when addressing all the circumstances and the welfare checklist. This summary included the following passage:

> "vi) It is clear that the children were exposed to their parents' dysfunctional relationship both in their home in the UAE and during visits to the family home in X;
>
> vii) I have found that both parents were responsible for the dysfunction and toxicity in their relationship;
>
> viii) I have made a number of findings against the father in the fact-finding judgment in terms of domestic abuse and controlling behaviour. However, it is fair to further record that these findings fundamentally relate to the period of the marriage. I also agree with [the Cafcass officer's] assessment that father's controlling behaviour did not pervade all aspects of the mother's life and

> would not lead him to act inappropriately in relation to the children in the future;
>
> ix) I also remind myself that I have found that the father used unacceptable physical chastisement towards the children in the past. However, I am satisfied that he has gained insight in relation to the inappropriate nature of such parenting methods. There have been no recent alleged incidents of this kind. I also bear in mind [the Cafcass officer's] evidence that the children demonstrate no sense of fear of their father. They clearly love him;
>
> x) In short, in my judgment, the earlier findings against the father do not preclude him from discharging a full and enduring role as a parent in the children's lives in the future."

49. The judge observed that there had been "a fairly detailed investigation of the family in these proceedings via the fact-finding hearing, together with a detailed Cafcass assessment in two parts". As a result, he was satisfied that he had sufficient evidence to make an informed decision on the father's application. He then acknowledged that the mother would be unable to apply for relocation should the children be returned to the UAE, which he described as "a factor which weighs against summary return". He continued (paragraph 164):

> "However, in my judgment, any application by the mother to remove the children from the UAE would be very likely to fail in any event. The children's very strong connections to the UAE set out above, together with the father's ongoing residence there and the mother's retention of the children in August 2022 would all count against any court granting a relocation application as being in the best interests of the children."

50. The judge then went through the factors in the welfare checklist. He summarised the children's ascertainable wishes and feelings as conveyed by the Cafcass officer, whilst observing that they were "in no way determinative of the issues before the court". He referred briefly to the children's needs, including in Y's case the possibility that she may have additional needs if it is confirmed that she is developmentally delayed. I note that he did not consider whether the children had any additional needs in the light of his findings of domestic abuse. He then considered the likely effect on the children of any change of circumstances. Notably, he addressed this by reference to their current circumstances – in other words, he considered the consequences of leaving their current life in England, in particular a change in their primary carer.

51. After summarising the children's age, background and characteristics, the judge then referred to the harm they had suffered in the following brief terms:

> "Sadly, as indicated more than once already, both children have been exposed to significant emotional harm by the parents, which has adversely interrupted the development of their appropriate attachments to them. This has potential long term adverse implications for them as they mature in adults."

He did not expressly consider the extent to which the children had suffered, or were likely to suffer, harm as a result of the domestic abuse which he had previously found had occurred.

52. The judge then turned to "the parents' capabilities" – meaning, in the terms of the welfare checklist, how capable each parent was of meeting the children's needs. He noted that both parents love the children and were able to meet the children's basic needs. He continued:

> "I now turn to the parents' deficiencies. I start by reflecting again on my fact-finding judgment. Frankly, both parents have previously failed their children as a consequence of the way they conducted their disintegrating relationship. Whilst the worst of this is now behind the children, with some damage having already been done to the children, there are still flashpoints around handovers and ongoing indirect contact."

With regard to the mother, he noted that she was unable to protect the children from her negative views of the father and struggled to promote contact with him and the wider paternal family. He continued:

> "I do bear in mind the findings that I have made against him. However, I have equally found that they do not disqualify him from fulfilling a full role in the children's lives. It is clear that the mother is struggling to come to terms with this reality."

This led him to conclude that he had "little, if any, confidence" that the mother would promote contact in the future if the children stayed with her in England.

53. In the father's case, however, the judge concluded that, while there were "clearly ongoing concerns", he was on balance less likely to expose the children to unwelcome influences in future. The judge accepted that "he has genuinely sought to promote a primary case that envisaged shared care between mother and him in the future".

54. The judge then summarised his decision in the following paragraphs:

> "191. There are a number of factors in support of the children remaining with the mother in X. In particular, this would be a continuation of the current arrangements thereby avoiding the impact of change, their basic needs will be met by her as their primary carer, they will remain physically close to members of the paternal family, they will accept such an outcome and, in Y's case, there will probably be appropriate special educational provision in the event that she has special need/s in this respect.
>
> 192. Nevertheless, in my judgement there are significant, and ultimately compelling, reasons in support of their summary return to the UAE. In particular, they will return to the familiarity of their 'home' in what is, in reality, their 'home country', they will have their needs met there, they will be exposed to less negativity in relation to the other parent and they will have their

> needs for appropriate contact with their mother and their wider extended families properly met in the future.
>
> 193. Accordingly, albeit following anxious reflection in a finely balanced case, I have ultimately reached the clear conclusion that the children should return to the UAE."

55. Finally, the judge made a series of consequential orders. On the basis that the mother was not intending to return to the UAE, he ordered the father to return the children to England for direct contact with the mother during all school holidays that were scheduled for seven days or longer, subject to a provision that they should spend defined periods with the father at Christmas and during the summer holidays. He made alternative provisions for contact in the event that the mother changed her position about returning to the UAE. He made it a condition of the order that a settlement agreement should be drafted by Ms Hamade reflecting his decision and incorporating a series of undertakings given by the parties and that it should be entered into a judgment in the courts in the UAE in accordance with Ms Hamade's advice. He gave the father permission to apply to vary or discharge this condition in the event that the mother failed to engage with this process. He directed that the existing undertakings about occupation of the family home in X and a prohibited steps order about postings on social media should continue for defined periods.

The appeal

56. The conduct of the appeal was unsurprisingly impeded by fact that, until the very last moment, the mother was acting in person. Fortunately, the process was greatly assisted by the very helpful actions of Ms Cara Nuttall, the father's solicitor, who ensured that the appeal bundles and all necessary documents were filed in time to allow the hearing to go ahead. We were also assisted by Mr Mansoor Fazli, counsel instructed at the last minute to represent the mother at the hearing.

57. The original grounds of appeal drafted by the mother herself set out a number of ways in which she asserted that the decision had been unjust. Mr Fazli sought permission to amend the grounds, partly I suspect to reflect the observations made by Moylan LJ when granting permission to appeal. Of the five grounds now advanced, four (grounds one, three, four and five) can be considered briefly. Ground two, however, is much more substantial.

58. Under amended ground one, it was contended that there were a number of "procedural defects" at the final hearing that cumulatively impacted in a material way the mother's ability to present her best evidence and to fully participate in the proceedings. Under this umbrella, complaint was made about the judge's refusal to allow the mother to adduce further evidence about Y's special needs, to adjourn the hearing to allow the mother to secure legal representation, to grant the mother a legal services protection order, and to arrange for the interpreter to remain throughout the hearing. It was also said that the court failed to make allowances for the fact that the mother had been diagnosed with PTSD. In those circumstances, it was submitted that the mother was accordingly at a disadvantage in cross-examining the father and drafting supplemental questions for Ms Hamade. It was submitted that the court failed to ensure to the extent practicable that the mother was on an equal footing with the father in order to participate in the proceedings. In support of this ground, Mr Fazli sought leave to file a statement

from the McKenzie friend giving details of how the mother was put at a disadvantage at the hearing and the pressures she was under.

59. None of these arguments persuades me that there was any irregularity in the hearing so as to require this Court to allow an appeal. The painstaking efforts taken by the judge to ensure that the mother was able to participate are described in detail in the judgment. His principal reason for refusing the adjournment was that he was concerned that it would lead to a further unwarranted delay in reaching decisions about the children's future. No proper application for further expert evidence was put before him. He decided to dispense with the services of the interpreter when it became clear that the mother's command of English was more than sufficient to enable her to participate. These were all decisions fully within his case management powers of the sort with which an appellate court will seldom interfere. It is of course regrettable that the mother was not represented before the judge, and unsurprising that in those circumstances she felt at a disadvantage and under pressure. Her experiences are sadly similar to many litigants who, because of the unavailability of legal aid, are obliged to contest proceedings in this area without legal representation. Those experiences do not, however, give rise to a valid ground of appeal.

60. Under ground three, it was submitted that the court failed to take into account the mother's immigration status. She has limited leave to remain in this country, given, it was asserted, on the basis that she is the children's primary carer. Mr Fazli submitted, that if the children were returned to the UAE, the mother would not be able to stay in this country, a development which would be contrary to the children's best interests. The judge had failed to analyse this issue properly. There is, however, no merit in this argument. The judge was aware of the mother's immigration status, and I see no basis for thinking he failed to take it into account in his analysis.

61. Under amended grounds four and five, the mother sought to challenge the reasons given for some of the findings made, and not made, in the fact-finding judgment. There was, however, no appeal against the judge's findings in the first judgment. This is an appeal against the decision made at the end of the second judgment. These grounds are wholly misconceived.

62. The real issue on this appeal is identified in amended ground two which is expressed as follows: "Failure to have adequate regard to all the facts found in the fact-finding judgement against the father when making the final welfare decision (flawed welfare analysis). Relying heavily on the CAFCASS's updated report in circumstances where the author of that report has not explicitly referred to/factored in the adverse findings made against the father before arriving at her conclusions."

63. In his skeleton argument, Mr Fazli listed the findings made against the father in the fact-finding judgment. He submitted that the Cafcass officer did not take all of them into account when making her final recommendation, save for the findings of financial abuse, and that this materially undermined the value of her assessment. The other findings of abuse were highly relevant when evaluating the mother's evidence, her position about returning to the UAE and her difficulties in supporting the father's contact. Given the finely-balanced nature of the decision, these omissions made a material difference to the outcome.

64. In response on behalf of the father, Mr Mark Jarman KC submitted that, against a background where the Cafcass officer was unable to rely upon the children's wishes and feelings and where the nature of the allegations provided safeguarding concerns about the father, the court rightly, albeit unusually, conducted a fact-finding hearing in a case where summary return was being sought. In his skeleton argument, Mr Jarman asserted that at the fact-finding hearing the court did not make findings in relation to the principal findings sought by the mother but did find "financial control" by the father, said by the court to be "towards the less serious end of the spectrum". In oral submissions, Mr Jarman accepted that there had been findings that the father had been violent to the mother. He described them as historic findings when the children were aged four and two. The judge had not minimised these findings but assessed them in the context of the parties' toxic relationship when both were behaving badly. At the final hearing, the judge had concluded that the findings against the father "[did] not disqualify him from fulfilling a full role in the children's lives". Mr Jarman submitted that the judge had considered carefully the findings he specifically made in relation the father's treatment of the children and determined that they were not sufficient to displace his ability to spend time with or care for the children.

65. In those circumstances, whilst acknowledging that there had been a gross delay in determining the issue of a summary return and that, unusually in the context of a summary return application, a fact finding exercise had been undertaken, Mr Jarman submitted that the judge had properly directed himself in relation to the factors to be considered before a summary return order could be made. In the light of the quantity of information he had both from Cafcass and also from his own assessment of the parties, he was right to exercise his discretion in the making of a what amounted to a full child arrangements order.

Discussion and conclusion

66. An order for the summary return of a child, under the Hague Convention or the inherent jurisdiction, is a decision that a child who has been wrongfully removed to or retained in this country should be returned to the child's place of habitual residence without a full investigation of the child's welfare. What is envisaged is that any dispute about child arrangements will be resolved after the child's return by the courts of that country.

67. As Moylan LJ observed when granting leave, the judge characterised the decision he had to make as being whether to order the "summary return" of the children to the UAE. He used that phrase at several points in the judgment and his citation of the law focused almost exclusively on that topic. Moylan LJ considered it "arguable that the judge adopted the wrong legal approach having regard to the fact that his decision was, in its effect, a long-term welfare decision and not simply a decision on whether to make a summary return order." The father's original application in October 2022 was indeed for the summary return of the children to the UAE. But the point at which the court could have ordered a "summary" return had passed when, following the recommendation of the Cafcass officer, the judge decided to hold a separate fact-finding hearing into the mother's allegations of domestic abuse. As Baroness Hale observed in *Re J*, in a passage cited by Poole J in *Re A and B* and in turn by the judge in this case, in a case brought under the inherent jurisdiction "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". But that is not what happened here. The court did not order the summary return of the children.

Instead, it conducted what the judge described as "a fairly detailed investigation of the family in these proceedings via the fact-finding hearing, together with a detailed Cafcass assessment in two parts". That amounted to a full investigation of the merits.

68. It is puzzling why, even as late as the final judgment, the judge was describing the decision he had to take as whether to order the summary return. It was because he was regarding the application in those terms that his exposition of the legal principles focused on the case law about summary returns under the inherent jurisdiction. It also explains the rather odd passage in his judgment (at paragraph 164, cited above) when he considered the fact that the mother would be unable to apply to the court in the UAE for relocation of the children back to England. The fact that the judge referred to the decision as one of summary return would not be a reason for allowing the appeal if in fact the judge carried out a full and proper assessment of the children's welfare by reference to the checklist in s.1(3) of the Children Act and other established principles. The real question is whether there was a flaw in the welfare analysis.

69. At several points in the second judgment, the judge referred in general terms to his earlier findings. But he did not refer to them in any detail. My initial reaction on reading the second judgment was that, given the evident care and professionalism with which the judge, and for that matter the Cafcass officer, had approached their tasks, it was difficult to accept that they could have overlooked the gravity of the findings made. Bearing in mind the well-established principle of restraint applied by this Court when invited to interfere with a judge's findings and evaluation of primary facts and the inferences to be drawn from them, I was at first inclined to take at face value the assertions in the second judgment that the court had in mind the findings made in the first. But on re-reading the judgments, I have concluded that the evaluation in the second judgment of the findings made in the first was fundamentally flawed.

70. The reason for the Cafcass officer's recommendation that there should be a fact-finding hearing and a determination by the court of the mother's allegations was that the allegations were "high risk" in nature and, if true, would "present a significant concern for both her and the children's safety in the care of their father in the UAE". Although the judge rejected a number of the mother's allegations against the father, including that he had sexually abused her, he made findings that the father had physically abused the mother and the children and subjected her to a form of control. The findings made, though less extensive than sought by the mother, were in my view substantial and serious and required careful evaluation by the court in the context of the totality of the evidence as to the children's welfare. I regret to say that this evaluation is conspicuously absent from the judge's lengthy and painstaking analysis.

71. Although the judge was plainly aware of the importance to be attached to allegations and findings of domestic abuse when making decisions about child arrangements, he seems to have lost sight of the significance of the findings he had made. It may be that he had been led to that position by the analysis in the supplemental Cafcass report. As already noted, it is striking that, when summarising the findings in her report (and, apparently, her oral evidence), the Cafcass officer made no explicit reference to the findings that the father had physically abused the mother and the children or to the impact of those findings on the children's welfare. For my part, I find this omission surprising, given the Cafcass officer's earlier observations in her first report that the children demonstrated "clear indicators of having sustained some emotional harm as a result of exposure to harmful adult behaviour" and that, if the mother's allegations were

true, they would "present a significant concern for … the children's safety in the care of their father in the UAE". Her interpretation of the fact-finding judgment was that the judge had concluded that "both parents were capable of initiating aggression towards one another". Her summary of the findings made was that the judge had "decline[d] to make findings of significant coercive and controlling abuse, and sexual abuse" and that, although a finding of financial abuse was made, it was "at the 'less serious end of the spectrum' of controlling abuse". With respect to her, this was not an accurate summary of the totality of the serious findings made by the judge.

72. The judge's findings about the father's abusive behaviour ought to have featured very prominently in his welfare analysis. His finding that the father had committed acts of physical violence against the mother and the children needed to be addressed when considering the harm that the children had suffered. Instead, the evaluation of harm was limited to the perfunctory passage cited above. For both children, their emotional needs have been heightened by their experiences during the acrimonious breakdown of the marriage to such an extent that the Cafcass officer was concerned for their long-term wellbeing whatever the outcome. When assessing their needs, the court needed to consider the extent to which they had been affected by the abuse which the court found the father had perpetrated. When assessing whether the father had the capacity to protect them from harm and meet their heightened emotional needs if they were living with him as a single parent in the UAE and separated from their primary carer, the court had to take into account the findings in the first judgment that "the father has an issue in managing his temper and anger in a domestic setting and was capable of initiating aggression and violence", and that part of the context for this behaviour was that "he found aspects of caring for the children at times challenging". In Y's case, there was in addition the uncertainty about whether she was developmentally delayed and, if so, whether, given the flaws in his character evident from the findings, the father had the capacity to ensure that her special needs were met in a country where professional support was likely to be limited. Any assessment of the mother's aversion to returning to the UAE and her capacity to promote contact with the father and his family had to be carried out in the context of the history of domestic abuse she had experienced. None of these issues received any, or any sufficient, attention in the judgment.

73. In this context, it is striking that, although the judge cited Practice Direction 12J (Child Arrangements and Contact Orders: Domestic Abuse and Harm) in the fact-finding judgment (together with quotations from the case law concerning domestic abuse), he did not consider it again in the welfare judgment.

74. Practice Direction 12J begins as follows:

"1. This Practice Direction applies to any family proceedings in the Family Court or the High Court under the relevant parts of the Children Act 1989 or the relevant parts of the Adoption and Children Act 2002 in which an application is made for a child arrangements order, or in which any question arises about where a child should live, or about contact between a child and a parent or other family member, where the court considers that an order should be made.

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."

75. On a strict interpretation of paragraph 1, the Practice Direction does not apply to proceedings brought under the inherent jurisdiction. On a broad interpretation of paragraph 2, however, it plainly would apply to such proceedings, and it is difficult to conceive of any good reason why it should not.

76. This point arose in *Re NY (A Child)* [2019] UKSC 49, a case which concerned an application for summary return to Israel under the inherent jurisdiction. At paragraph 50, Lord Wilson said:

> "The mother points out, however, that, by para 1, the Practice Direction applies only to proceedings under the relevant parts of the 1989 Act (which would include an application for a specific issue order) or of the Adoption and Children Act 2002. Therefore it does not expressly apply to the determination of any application under the inherent jurisdiction, including of an application governed by consideration of a child's welfare in which disputed allegations of domestic abuse are made. 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."

77. In this case, the judge decided to conduct such an inquiry and made findings that abuse had occurred. Under the heading "In all cases where domestic abuse has occurred", paragraph 33 of the Practice Direction provides:

> "Following any determination of the nature and extent of domestic abuse, whether or not following a fact-finding hearing, the court must, if considering any form of contact or involvement of the parent in the child's life, consider-
>
> (a) whether it would be assisted by any social work, psychiatric, psychological or other assessment (including an expert safety and risk assessment) of any party or the child and if so (subject to any necessary consent) make directions for such assessment to be undertaken and for the filing of any consequent report. Any such report should address the factors set out in paragraphs 36 and 37 below, unless the court directs otherwise;
>
> (b) whether any party should seek advice, treatment or other intervention as a precondition to any child arrangements order being made, and may (with the consent of that party) give directions for such attendance".

78. Under the heading "Factors to be taken into account when determining whether to make child arrangements orders in all cases where domestic abuse has occurred", paragraphs 35 to 37 of the Practice Direction provide:

"35. When deciding the issue of child arrangements the court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.

36. (1) In the light of-

(a) any findings of fact,

(b) admissions; or

(c) domestic abuse having otherwise been established,

the court should apply the individual matters in the welfare checklist with reference to the domestic abuse which has occurred and any expert risk assessment obtained.

(2) In particular, the court should in every case consider any harm-

(a) which the child as a victim of domestic abuse, and the parent with whom the child is living, has suffered as a consequence of that domestic abuse; and

(b) which the child and the parent with whom the child is living is at risk of suffering, if a child arrangements order is made.

(3) The court should make an order for contact only if it is satisfied-

(a) that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before, during and after contact; and

(b) that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent.

37. In every case where a finding or admission of domestic abuse is made, or where domestic abuse is otherwise established, the court should consider the conduct of both parents towards each other and towards the child and the impact of the same. In particular, the court should consider –

(a) the effect of the domestic abuse on the child and on the arrangements for where the child is living;

(b) the effect of the domestic abuse on the child and its effect on the child's relationship with the parents;

(c) whether the parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent;

(d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and

(e) the capacity of the parents to appreciate the effect of past domestic abuse and the potential for future domestic abuse."

79. In this case, no risk assessment was sought or obtained following the findings of abuse made against the father. So far as I am aware, no consideration was given as to whether the father should undergo any form of intervention as a precondition to any child arrangements order being made. Furthermore, when carrying out its welfare evaluation, the judge did not address the factors which paragraphs 35 to 37 of the Practice Directions requires a court to take into account in all cases where domestic abuse has occurred. In particular, he failed to "apply the individual matters in the welfare checklist with reference to the domestic abuse which he previously found had occurred". I bear in mind that the mother was not represented at the final hearing, and it seems that the judge's attention was not drawn to this part of the Practice Direction. If it had been in his mind, I feel confident that he would have considered and, as appropriate, applied by analogy the provisions of the Practice Direction setting out the course to be followed when findings of abuse are made.

80. Practice Direction 12J is often portrayed as breaking new ground. But it ought to be seen as reflecting best practice. Paragraph 36(1) is really an example of the fundamental principle that in reaching a decision in children's cases the court must consider each piece of the evidence in the context of all the other evidence. The fact that, as the judge remarked in the welfare judgment. his findings "fundamentally relate[d] to the period of the marriage" and that the father's controlling behaviour "did not pervade all aspects of the mother's life" did not obviate the requirement to consider the findings carefully when assessing all the factors in the welfare checklist. Neither did the fact that, as Mr Jarman argued, the abusive acts occurred in the context of the parties' toxic relationship when both were behaving badly. Without analysing the individual matters in the welfare checklist in the context of the domestic abuse which he found had occurred, the judge was in my view in no position to conclude that his findings against the father did not preclude him becoming the children's primary carer. In those circumstances, and given that this was, in the Cafcass officer's words, a finely balanced case, these significant omissions in the judge's analysis mean that his decision cannot stand.

81. I would therefore allow the appeal on ground two and set aside the order for summary return. There must be a fresh welfare hearing, not of the application for summary return,

but to reconsider the appropriate arrangements for the children's future care – whether they should be placed with their mother in England or their father in the UAE. I urge the parties, even at this late stage, to see whether these issues can be resolved by agreement. If a further welfare hearing is unavoidable, it should be listed before a different judge who will have to take into account, as part of the totality of the evidence, the findings made at the fact-finding hearing in May 2023. I would therefore propose that the case be remitted to Keehan J, the Senior Family Presiding Judge, to be allocated to a judge of the Family Division able to accommodate a hearing which will involve this difficult and finely-balanced welfare decision.

LADY JUSTICE ANDREWS

82. I agree.

LADY JUSTICE ASPLIN

83. I also agree.