England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2014] EWCA Civ 554
Case No: B4/2013/3415;B4/2013/3415 (B)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT FAMILY DIVISION
Mrs Justice Parker
FD13PO1412

Royal Courts of Justice
Strand, London, WC2A 2LL
1st May 2014

B e f o r e :

LORD JUSTICE MOORE-BICK
LADY JUSTICE BLACK
and
LORD JUSTICE McFARLANE

Re: KP (A child)

Mr James Turner QC and Mr Edward Devereux (instructed by Bindmans LLP) for the Appellant
Mr David Williams QC and Mr Mark Jarman (instructed by Creighton & Partners) for the First Respondent
Mr Teertha Gupta QC and Mr Michael Edwards (instructed by Freemans Solicitors) for the Second Respondent
Hearing date: 6th February 2014

HTML VERSION OF JUDGMENT

Lord Justice Moore-Bick:

1. This is the judgment of the court with which all three members agree.

2. This is an appeal from a decision of Mrs Justice Parker made on 5th November 2013 at the conclusion of Hague Convention proceedings seeking the return of a child to Malta pursuant to the Child Abduction and Custody Act 1985. At the conclusion of the final hearing the judge ordered that the child should return to Malta. The mother's appeal is brought before this court, permission having been granted by Black LJ on 12th December 2013.

3. Although other grounds are relied upon, the primary thrust of the appellant's case focuses upon the fact that the judge conducted an extensive meeting with the child during the hearing.

4. The child, K, was born on 9th September 2000 and is therefore now 13.5 years old. She is Maltese. With the exception of two periods of separation, her Maltese parents cohabited with each other from 1999 until April 2013. K has always lived in Malta, save for a brief period in England in 2003. She has a Maltese grandfather who lives in London. On 12th June 2013 the mother brought K to England, without the knowledge or consent of the father. Since that time they have been living with the maternal grandfather in London. The father issued proceedings in England and Wales under the Hague Convention. Following a number of short early hearings which are uncontroversial, the final hearing before Parker J occupied two separate court days on 23rd September and 26th September 2013. By that stage the mother accepted that the father had rights of custody within the terms of the Hague Convention and that her removal of K to England in June 2013 amounted to a "wrongful removal", thereby triggering a requirement for the court summarily to order K's return to Malta unless one or more of the exceptions within the Convention was established.

5. The mother relied upon two such exceptions, firstly the child's objections and secondly Article 13(b). The relevant terms of Article 13 of the Convention are as follows:

> "Child objections
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> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> Article 13(b)
>
> … the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that … there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

6. In support of her case, the mother made criticisms of the father and his behaviour, sought to characterise him as angry, moody and aggressive, but fell short of complaining of actual physical violence. There is a dispute between the parents as to what part the father played in K's upbringing before the separation.

7. So far as K is concerned, she was interviewed by a member of the CAFCASS High Court team on

16th September. During the course of what was plainly a substantial discussion, K stated that she would not be returning to Malta. She described Malta in negative terms, particularly highlighting that it was a small island, where everybody knew each other's business, where she had experienced poverty and that, although the weather and the scenery were nice, the language and the people were "horrible". She also spoke in negative terms about her father. Later in the interview on the question of how K would respond if she were required to return to Malta she stated that she would need to be "tranquilised to get on the plane". She told the CAFCASS officer that she would simply refuse to go.

8. The CAFCASS assessment spoke positively about K, who had impressed the officer as an articulate, witty, confident and engaging young person, for whom Malta had become associated with conflict and difficulties. Whilst the author of the report did not identify information indicative of a risk of grave harm to K were she to return to Malta, there was concern about the strength of K's expressed refusal to do so.

9. K was not separately represented before Parker J, but she has been a party, represented by counsel, to this appeal.

10. The plan for the judge to meet K seems to have developed during the oral testimony of the CAFCASS officer on the first morning of the hearing. The topic of a judicial meeting, unhelpfully, was not covered in the CAFCASS officer's written report. During her oral evidence the CAFCASS officer explained how K 'really feels unheard' and she advised that it would be 'really helpful' for the judge to meet with K. The transcript then records a discussion about whether any meeting should be before the court made its decision, or after, or both. The CAFCASS officer and the judge were of the same view that, in this case, it was likely to be helpful for the judge to meet K both before the decision was made and afterwards. K, who was not expecting to come to court that day, was collected from school and brought to the Royal Courts of Justice. When she met the judge she explained that she had known that she would be meeting the judge at some stage, but had not expected it to take place that day.

11. Given the importance that the judge's meeting with K plays in the appeal we propose at this stage to set out the judge's account in relation to the meeting as it appears at paragraphs 15 to 22 of her judgment.

> "15. At the outset I discussed with the parties, and again with the CAFCASS officer (who was the first witness) whether I should see K. I indicated my intention to:
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> > i) tell her that I was conducting a limited evaluation in accordance with an international agreement;
> >
> > ii) see her in accordance with the Guidelines for Meeting Children [2010] 2 FLR 1872. The Guidelines stress that the child should be assisted to feel part of the proceedings, and to understand the process as well as expressing their views.
>
> 16. I stated that my usual practice with children of this age is to see them in the courtroom, although sitting in the well of the court, with the guardian, the associate, the usher and my clerk present (to assist with a note). I said that I would speak to K about whether she was happy about this. My reason for seeing K in the courtroom rather than in my room was:
>
> > a) so that there could be a recording;

b) because I consider it important that a young person of K's age should appreciate the seriousness of the issues and that the meeting is part of the court process;

c) Mr Devereux in particular stressed that I should see K in court so that our discussion could be recorded and the mother's legal team could obtain a transcript.

17. I expressed my view (not for the first time) that with a young person of this age:

a) I should stress to K that she had a responsibility to comply with an order of the court, if made after I had considered her objections and concluded that they did not justify non-return.

b) I was entitled to form an evaluation of her wishes and feelings including on her presentation and demeanour and take into account any differences in what she had said.

18. Mr Devereux questioned the purpose and status of my discussion. I accept Mr Boyd's submission that I was in fact hearing K's **representations**: hearing her voice direct, not evidence, and in some respects akin to submissions. In that context, it was permissible for me to probe what she said not by in effect cross-examining her but by asking her to expand and to explain.

19. After I had raised the question of seeing K Mr Devereux referred me to *Re G (Abduction) (Children's Objections)* [2010] EWCA Civ 1232, [2011] 1 FLR 1645, repeated in *Re J (Abduction) (Children's Objections)* [2011] EWCA Civ 1448, [2012] 1 FLR 457 that the Judge needs to assess where a return order will lead if enforcement were resisted, and could be an influence for acceptance. I had already raised this issue.

20. I saw K for over an hour. I reported back in detail after the meeting. I have a very full note, and had at the time a very clear recollection of what had been said. I have checked my note.

21. K was brought to court by her grandfather. She had not expected to come to court that day, but at a later date. Why this was, since the hearing was originally listed only for one day, I do not know. K agreed to see me in the courtroom, with the tape on. She understood that there could be no secrets, and that a transcript might be obtained.

22. K said something to the CAFCASS officer after the meeting with me and the CAFCASS officer gave further evidence about this. All agreed that this justified the offer of another meeting between K and the CAFCASS officer. K took this up and the CAFCASS officer provided another brief report."

12. In addition to the judge's account as it appears in the judgment, we have been provided with a transcript of the entirety of the meeting between K and the judge.

13. Returning to the content of the judgment, after the judge had summarised aspects of the relevant law, she concluded, on this point, at paragraph 32 as follows:

"I accept that K is objecting and that she is of an age and a degree of maturity when it is

appropriate to take account of her views."

14. Thereafter under a heading "K's objections analysed" from paragraphs 33 to 63, over the course of eight pages of the transcribed judgment, the judge draws upon the available information about K's objections contained in the following sources:

> i) A note which K provided for the CAFCASS officer, written, according to her, some weeks before the hearing;
>
> ii) K's meeting with the CAFCASS officer, of some 2 hours and 20 minutes, on 10 September 2013;
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> iii) K's meeting with Parker J on 23 September 2013;
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> iv) What K said to the CAFCASS officer outside Court
>
> after that meeting;
>
> v) A further meeting with the CAFCASS officer.

15. At the close of the case the CAFCASS officer's opinion was that there should be no order for return. The judge questioned that view and concluded, at paragraph 51, that:

> "I accept that K was very passionate and emotional. But in my view [the CAFCASS officer] has responded to the passion without evaluating what she has actually said."

16. The judge concluded that K was, in reality, very confused and was not, in fact, objecting to a return to Malta as such on any cogent or rational grounds. The judge therefore concluded that there was some ambivalence about K returning to Malta and, in the end, the judge's concern was that the strongest reason in support of a non-return would be the young person's physical refusal to board the plane. On the basis of what K had said to the judge during their meeting the judge concluded:

> "I do not think that I need to fear that now. I found it highly significant that once given permission by me that she could accept that with support she will return to Malta"

17. The judge dealt with the Article 13(b) exception more shortly. She concluded that the family's living arrangements in the event of a return to Malta, though not lavish, were not such as to create a grave risk of harm. That material, coupled with the judge's view of K and her objections to return, led to a conclusion that the Article 13(b) exception was not established. The judge further concluded that, even if it were established, she would order a return. The conclusion of the judgment as a whole is in these terms:

> "In this case it is in K's interests to return. Quite apart from the underlying purpose of the Convention, it is in her interests to return to her home, her environment, her school, and to a place where she may be able to restore her relationship with her father."

Arguments on appeal

18. Mr James Turner QC, leading Mr Edward Devereux (who appeared below), focussed their principal challenge on the fact that the judge obtained and then relied upon evidence from K received during the meeting with the judge. Essentially, it is submitted that the judge was in error in using the evidence thus obtained to support her rejection of the clear and consistent evidence of the CAFCASS officer and in

doing so the judge significantly contravened the *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* (April 2010) as approved by the then President of the Family Division.

19. In addition the following more specific submissions were made:

i) The judge erred by focussing too narrowly on the question of the "rationality" of any objections, rather than considering their genuineness and wider considerations relating to K's welfare;

ii) The judge made findings that K had been subject to influence from her mother and that she was ambivalent about a return that were simply not supported by the objective and tested evidence;

iii) The judge wrongly rejected the evidence of the CAFCASS officer as to the psychological consequences for K of a return (by relying on evidence that she, the judge, had obtained during the course of her meeting with K); and

iv) As to Article 13(b) the judge failed, properly, to consider what protective measures were in place or were available in Malta in the event that K was returned there.

Guidelines

20. It is appropriate at this stage to set out in full the *"Guidelines for Judges Meeting Children who are Subject to Family Proceedings"* which were issued by the Family Justice Council and Sir Nicholas Wall, as President of the Family Division, in April 2010 in the following terms:

> "In these Guidelines:
>
> • All references to 'child' or 'children' are intended to include a young person or young people the subject of proceedings under the Children Act 1989.
>
> • 'Family proceedings' includes both public and private law cases.
>
> • 'Judge' includes magistrates.
>
> • Cafcass includes CAFCASS CYMRU.
>
> **Purpose**
>
> The purpose of these Guidelines is to encourage judges to enable children to feel more involved and connected with proceedings in which important decisions are made in their lives and to give them an opportunity to satisfy themselves that the Judge has understood their wishes and feelings and to understand the nature of the Judge's task.
>
> **Preamble**
>
> • In England and Wales in most cases a child's needs, wishes and feelings are brought to the court in written form by a Cafcass officer. Nothing in this guidance document is intended to replace or undermine that responsibility.
>
> • It is Cafcass practice to discuss with a child in a manner appropriate to their developmental understanding whether their participation in the process includes a wish to meet the Judge. If the child does not wish to meet the

Judge discussions can centre on other ways of enabling the child to feel a part of the process. If the child wishes to meet the Judge, that wish should be conveyed to the Judge where appropriate.

• The primary purpose of the meeting is to benefit the child. However, it may also benefit the Judge and other family members.

Guidelines

1. The judge is entitled to expect the lawyer for the child and/or the Cafcass officer:

(i) to advise whether the child wishes to meet the Judge;

(ii) if so, to explain from the child's perspective, the purpose of the meeting;

(iii) to advise whether it accords with the welfare interests of the child for such a meeting take place; and

(iv) to identify the purpose of the proposed meeting as perceived by the child's professional representative/s.

2. The other parties shall be entitled to make representations as to any proposed meeting with the Judge before the Judge decides whether or not it shall take place.

3. In deciding whether or not a meeting shall take place and, if so, in what circumstances, the child's chronological age is relevant but not determinative. Some children of 7 or even younger have a clear understanding of their circumstances and very clear views which they may wish to express.

4. If the child wishes to meet the judge but the judge decides that a meeting would be inappropriate, the judge should consider providing a brief explanation in writing for the child.

5. If a judge decides to meet a child, it is a matter for the discretion of the judge, having considered representations from the parties –

(i) the purpose and proposed content of the meeting;

(ii) at what stage during the proceedings, or after they have concluded, the meeting should take place;

(iii) where the meeting will take place;

(iv) who will bring the child to the meeting;

(v) who will prepare the child for the meeting (this should usually be the Cafcass officer);

(vi) who shall attend during the meeting – although a Judge should never see a child alone;

(vii) by whom a minute of the meeting shall be taken, how that minute is to

be approved by the Judge, and how it is to be communicated to the other parties.

It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence. That is the responsibility of the Cafcass officer. The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her.

6. If the meeting takes place prior to the conclusion of the proceedings –

(i) The judge should explain to the child at an early stage that a judge cannot hold secrets. What is said by the child will, other than in exceptional circumstances, be communicated to his/her parents and other parties.

(ii) The judge should also explain that decisions in the case are the responsibility of the judge, who will have to weigh a number of factors, and that the outcome is never the responsibility of the child.

(iii) The judge should discuss with the child how his or her decisions will be communicated to the child.

(iv) The parties or their representatives shall have the opportunity to respond to the content of the meeting, whether by way of oral evidence or submissions."

21. In addition to the *"Guidelines for Judges meeting Children",* 18 months later a working party of the Family Justice Council issued *"Guidelines in relation to children giving evidence in family proceedings"* which can be found at [2012] 2 FLR 456. These latter guidelines were issued following the Supreme Court decision in *Re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 WLR 701 where it was held that there was no longer a presumption, or even a starting point, against children giving evidence in family proceedings. It is not necessary for the purposes of this judgment to quote extensively from the guidelines relating to children giving evidence. It is plain that the focus of those guidelines is upon a child "giving evidence" within the ordinary setting of an adversarial court hearing. In that regard, and in the light of the Supreme Court decision in *Re W*, it is stressed that "the Court's principal objective should be achieving a fair trial". Thereafter the substance of the guidelines focuses entirely upon a child who is to be called to give oral evidence within the proceedings. In the circumstances those guidelines have no direct application to the circumstances in the present appeal, save to underline the difference between the process, on the one hand, of a judge simply meeting a child and a process, on the other, whereby what the child says is received as formal evidence in the case.

The approach of the courts to "hearing" children in Hague cases

22. In addition to the formal guidelines, the question of judges meeting children, particularly within the context of child abduction proceedings, has been considered by the courts on a number of previous occasions. Before turning to those cases however, it is helpful to describe the process that a court evaluating a child's objection under Article 13 has to undertake. The process was described in clear terms by Ward LJ in *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192. Ward LJ described a three stage process. Stage 1 involves finding whether the child objects to being returned to the country of habitual residence. Stage 2 is to determine whether the child has sufficient age and

maturity to come within Article 13. In the present case Parker J readily found those two stages established in K's favour. It is therefore the third stage, as described by Ward LJ, which is of the greatest importance in evaluating this appeal:

> "(3) So a discrete finding as to age and maturity is necessary in order to judge the next question, which is whether it is appropriate to take account of the child's views. That requires an ascertainment of the strength and validity of those views which will call for an examination of the following matters, among others:
>
> > (a) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is *her* views which have to be judged appropriate. [original emphasis]
> >
> > (b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?
> >
> > (c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly, or indirectly exerted by the abducting parent?
> >
> > (d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?"

23. The question of how children should be "heard" in cases under the Hague Convention was considered by the House of Lords in the case of *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619. By the time the case was heard in the House of Lords the boy who was the subject of the proceedings was aged eight and had been in England for nearly four years following removal, by his mother, from Romania. The primary question for their Lordships related to whether or not the father had rights of custody, but their Lordships were also required to consider whether or not a "child's objection" exception was established and were invited to consider ways in which the point of view of a child in such circumstances should be placed before the court in Hague Convention proceedings. That latter aspect was canvassed by Baroness Hale of Richmond, giving the leading speech, at paragraph 57 onwards in the following terms:

> "57…As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parent's views.
>
> 58 Brussels II Revised Regulation (EC) No 2201/2003 recognises this by reversing the

burden in relation to hearing the child. Article 11(2) provides:

> "When applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

Although strictly this only applies to cases within the European Union (over half of the applications coming before the High Court), the principle is in my view of universal application and consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child. It applies, not only when a "defence" under article 13 has been raised, but also in any case in which the court is being asked to apply article 12 and direct the summary return of the child - in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child is, as already stated, not to be confused with giving effect to his views.

59 It follows that children should be heard far more frequently in Hague Convention cases than has been the practice hitherto. The only question is how this should be done. It is plainly not good enough to say that the abducting parent, with whom the child is living, can present the child's views to the court. If those views coincide with the views of the abducting parent, the court will either assume that they are not authentically the child's own or give them very little independent weight. There has to be some means of conveying them to the court independently of the abducting parent.

60 There are three possible ways of doing this. They range from full scale legal representation of the child, through the report of an independent CAFCASS officer or other professional, to a face to face interview with the judge. In some European countries, notably Germany, it is taken for granted that the judge will see the child. In this country, this used to be the practice under the old wardship system, but fell into disuse with the advent of professional court welfare officers who are more used to communicating with children than are many judges. The most common method is therefore an interview with a CAFCASS officer, who is not only skilled and experienced in talking with children but also, if practising in the High Court, aware of the limited compass within which the child's views are relevant in Hague Convention cases. In most cases, this should be enough. In others, and especially where the child has asked to see the judge, it may also be necessary for the judge to hear the child. Only in a few cases will full scale legal representation be necessary. But whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented.

61 Hitherto, our courts have only allowed separate representation in exceptional circumstances. And recently in *In re H (Abduction)* [2007] 1 FLR 242, the view was expressed in the Court of Appeal, that if the test for party status were to be revised in any direction, it should in future be more rather than less stringently applied. But Brussels II Revised Regulation requires us to look at the question of hearing children's views afresh. Rather than the issue coming up at a late stage in the proceedings, as has tended to take place up to now, European cases require the court to address at the outset whether and

> how the child is to be given the opportunity of being heard. If the options are canvassed then and there and appropriate directions given, this should not be an instrument of delay. CAFCASS officers and, in the few cases where this is appropriate, children's representatives are just as capable of moving quickly if they have to do so as anyone else. The vice has been when children's views have been raised very late in the day and seen as a "last ditch stand" on the part of the abducting parent. This is not the place they should take in the proceedings. There is no reason why the approach which should be adopted in European cases should not also be adopted in others. The more uniform the practice, the better."

24. As Baroness Hale demonstrates in the section from *Re D* to which we have referred, the emphasis of both the European law and her own judgment in that case is upon the child being "heard" so that the court is exposed to the child's "point of view" with the court hearing "what the child has to say" [paragraph 57]. A range of procedural facilities may be deployed which will include, in some cases, a face to face interview between the child and the judge.

25. In a manner that was entirely in tune with the approach advocated by Baroness Hale in *Re D*, Sir Mark Potter, during his time as President of the Family Division, undertook a number of meetings with the children involved in Hague Convention proceedings at first instance. One such is reported at *JPC v SLW and SMW (Abduction)* [2007] EWHC 1349 (Fam), [2007] 2 FLR 900. That case concerned a girl who was aged over 14 years at the time of the proceedings. Sir Mark Potter P describes the judicial interview as follows at paragraph 47:

> "I have already set out the firmness and clarity of S's objections. In addition to reading her evidence and hearing the submissions of counsel on her behalf, I saw her in my room for some 15 to 20 minutes in accordance with Article 11.2 of Brussels II Revised. I did so in the presence of her solicitor and the mother's solicitors as note-takers, having explained to the parties that I did not consider their presence appropriate in the light of the inhibitions it might place upon my conversation my with S, which position was accepted by the mother and father. Apart from hearing anything which S wished to tell me, I was concerned to explain to her the nature of my task and why, in the face of her objections, I might none the less feel obliged to order her return in the light of the nature of the Hague Convention jurisdiction. I was impressed by her articulacy and her understanding in relation to those matters as explained to her. She did not rein back upon any of the views she had expressed in her evidence; however, I was encouraged by her apparent (albeit reluctant) acceptance of the possible necessity for her to return to a further hearing before the Irish Court for a decision as to her future welfare in the light of events as they have turned out since October 2006."

26. The description given by Sir Mark Potter in *JPC* indicates a dual process during which the young person had the chance to say "anything which [she] wished to tell me" and the judge, for his part, explained to her the nature of his task and how an order for return may nonetheless be made despite her firm objections.

27. A similar process was undertaken by Sir Mark Potter P in *De L v H* [2009] EWHC 3074 (Fam), [2010] 1 FLR 1229. In that case the young person was also 13 years old. The judge had evidence of his objections to a return to Portugal via a CAFCASS report, two affidavits from the Children's Guardian appointed to represent him, which included the Guardian's note of a meeting with his charge and, finally, the judge had "a lengthy conversation" with the young man in the presence of the CAFCASS officer. At paragraph 44 Sir Mark Potter explains that he took "this unusual course in the

light of [the boy's] age and maturity, and his view, firmly expressed to the Guardian, that he wished to see the judge who decided his case". At paragraph 45 Sir Mark sets out the various purposes of the judicial meeting:

> "(a) assuring him that I had received full evidence as to the nature and force of his objections;
>
> (b) at the same time explaining to him the law in relation to the issues before me, the philosophy of the Convention, the constraints upon the English Court on proof of wrongful removal, and the fact that, if I declined to order his return, the Portuguese Court might nonetheless require it; and
>
> (c) seeking to dissuade R from his expressed distrust of the Portuguese Court."

28. Later, at paragraph 65, Sir Mark Potter describes the meeting in the following terms:

> "I consider that the observations of Ms Barnes and his guardian in those respects were amply confirmed and justified in the course of my own conversation with him for the purpose of ensuring that he understood the nature of the court's tasks and the constraints imposed upon it in reaching its decision. He fully demonstrated his capacity to understand the position and to explain his own wishes and state of mind generally, as well as in relation to a return to Portugal even for a restricted period to await the outcome of the Portuguese proceedings. He engaged calmly and intelligently with the issues, while firmly maintaining and explaining his objections to return."

29. As in the case of *JPC*, the process described by Sir Mark Potter does not include receiving evidence from the young person or questioning him in order to evaluate the rationality, or otherwise, of his objections. The process is simply, but importantly, a two way transmission in which the young person says what they wish to say and the judge explains the court's role within the structure of the Convention.

30. The next case of note is a decision of this court (Thorpe and Smith LJJ) in *Re G (Abduction:Children's Objections)* [2010] EWCA Civ 1232, [2011] 1FLR 1645. In that case the court considered the objections of two children, aged 13 years and 9 years, to a return under the Hague Convention to Canada. The judge at first instance had no difficulty in holding that the child's exception was established with respect to both girls, however, in keeping with the primary objective of the Convention, and holding that this was a paradigm case of abduction, he ordered the return of the children. The case is of note because, in contrast to the first instance judge, the judges in the Court of Appeal met the eldest child before deciding the outcome of the case. In the course of the leading judgment of Thorpe LJ the ground for a judicial meeting is set in the following manner:

> "15. There is, in this branch of international family law, a growing perception that the judge at trial should hear the voice of the child: that is implicit from the Hague Convention itself but made explicit by the United Nations Convention on the Rights of the Child 1989. Of course, the manner in which the judge hears the child is a matter for local custom and tradition. In this jurisdiction, judges in the High Court have not traditionally in modern times heard the voice of the child directly but through the officer of the court, the CAFCASS Officer. That tradition is now under scrutiny, debate and revision. The subcommittee of the Family Justice Council that is concerned to ensure the safeguarding of the rights of children has forcefully expressed the view that judges in this jurisdiction

> should be meeting children and hearing their voice in carefully arranged conditions; given the fact that E was seeking to communicate her views to the decision maker, it is perhaps with hindsight a pity that the judge did not have the opportunity of meeting her and hearing from her own lips."

Later, at paragraph 21, Thorpe LJ said this:

> "It is highly unusual for this court to meet a child before deciding an appeal. It is the first time I have ever had that experience, but I believe that it was justified and necessary in this case, given the fact that the judge did not himself meet E and did not seemingly attach much weight to the letter that she had written to him as decision maker."

31. In December 2011 the case of *Re J (Abduction: Children's Objections)* [2011] EWCA Civ 1448, [2012] 1 FLR 457 saw Thorpe LJ and Sir Mark Potter sitting, together with Hallett LJ, on an appeal which raised the very issue of a judge seeing a child within the context of Hague Convention proceedings. In that case, the children, aged 15, 13 and 10 had been wrongfully removed from their home in Poland by their mother some five months prior to the appeal. The primary issue in the case was whether a child's objection exception under Article 13 was established and, if so, whether a return order should be made. At first instance evidence of the children's strong wish to remain in England came from an interview conducted by a specialist CAFCASS officer. The judge doubted that the children's position was sufficient to establish an exception under Article 13, but he indicated that in any event he would exercise his discretion in favour of a return. On appeal, counsel for the appellant argued that the facts of the case required the judge to have conducted a meeting with the children on the basis, as recorded in the judgment of Thorpe LJ, that "it was simply unacceptable for the judge to impose on the children the return that they dreaded without engaging them in the process". From paragraph 31 onwards Thorpe LJ analysed that submission:

> "31. However I am impressed by Mr Williams's submission that the Judge should of his own motion have engaged the children in the process.
>
> 32. It is of course easy to form hindsight judgments. Were the developments which are before this court foreseeable? Certainly the concluding paragraphs of Mrs Julian's report should have alerted the Judge to the risk.
>
> 33. Furthermore the flow of authority pointed towards a meeting. Sir Mark Potter when President in a number of reported cases emphasised the desirability of a face to face meeting between Judge and children in appropriate cases: See *JPC v SLW and SMW (Abduction)* [2007] 2 FLR 900 and *DeL v H* [2010] 1FLR 1229.
>
> 34. Also for the Judge's guidance there was the reported case of *Re G (Abduction:Children's Objections)* [2011] 1FLR 1645. I only emphasise what I said at paragraph 15 of my judgment" [set out at paragraph 28 above]
>
> 35. I would also emphasise what I said at paragraph 21:-
>
> "Courts of trial and appellate courts have to consider the implementation of a judgment for return. A court needs to be alive to the difficulty of

> implementing a return order, where the subject of the return order is an articulate, naturally determined and courageous adolescent."
>
> 36. As well as these authorities the Judge had the advantage of the President's Practice Note (Guidelines for Judges meeting Children who are subject to Family Proceedings) of April 2010. That Practice Note is the product of the sub committee of the Family Justice Council to which I referred in paragraph of my judgment in *Re G* (see paragraph 34)."

At paragraphs 37 and 38 Thorpe LJ stressed that the guidelines applied to Hague Convention proceedings just as much as to any other family proceedings and then at paragraph 39 he expressed his conclusion as follows:

> "39. These children understandably felt themselves to be vulnerable and lost in a complex legal landscape. They needed to understand that the proceedings in this jurisdiction were brought under an international instrument and were essentially summary in character. They needed to understand that they were habitually resident in Poland and that accordingly the Polish court had primary jurisdiction under Article 8 of Brussels II Revised. They needed to understand that any profound investigation of their future would be determined by the paramount consideration of their welfare and that the task of assessing that was for the Polish Judge. They needed to understand that their mother had initiated that process during the course of the summer holiday. They needed to understand that a summary return order might be a transient order dependent on the outcome of the mother's application for custody and relocation. They needed to be informed of the fundamental shift in their mother's case elicited by the Judge's questions."

More generally at paragraph 40 Thorpe LJ emphasised the value of a judicial meeting in Hague Convention cases:

> "In these cases an option open to the Judge is a meeting at which practicalities, consequences and reassurances can be ventilated. The Judge sits above the family turmoil. The Judge's authority can be an influence for acceptance. Importantly a meeting gives the Judge an opportunity directly to assess where the return order will lead if enforcement will be resisted."

32. The appeal was, therefore, allowed on the basis that the judge erred in not, at least, raising with the parties the need for him to meet the children face to face.

33. More recently, and some weeks after Parker J determined the case before us, the Supreme Court handed down judgment in *Re LC (Children)(Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] WLR 124. The appeal related to Hague Convention proceedings with respect to four children, the eldest of whom was 13. At first instance Cobb J held that the eldest child's objections were sufficient to engage Article 13, however, the judge ordered a return to the home country, Spain. A specialist CAFCASS officer had filed two reports and had given oral evidence. The eldest child, T, was not a party to the proceedings, Cobb J having refused an application for party status.

34. The question of whether or not a young person in such a position should be joined as a party occupied a significant part of the judgment of Lord Wilson SCJ, with whom Lord Toulson and Lord Hodge agreed. In the event, for reasons that do not impact upon this appeal, Lord Wilson concluded that such

a young person should be joined as a party in particular (paragraph 54) so that evidence as to her state of mind could be given from a stand point which was simply incapable of being represented to the court by either of the adult parties. At paragraph 55, Lord Wilson went on to say this:

> "A grant of party status to a child leaves the court with a wide discretion to determine the extent of the role which she should play in the proceedings. Although, unusually in Convention proceedings, Cobb J heard oral evidence from the parents as well as from Ms Vivian, it would surely have been inappropriate for him to receive oral evidence in court from T even if she had been a party to the proceedings. It is conceivable that, had he considered that her evidence might prove determinative yet needed to be further explored, Cobb J might have invited counsel, particularly counsel for the mother, to ask age-appropriate questions of her otherwise than in court and recorded on video-tape. In all probability however, the reasonable course would have been to confine T's participation in the proceedings to
>
> > i) the adduction of a witness statement by her, or of a report by her guardian, which was focussed upon her account of her residence in Spain including of her state of mind at that time;
> >
> > ii) her advocate's cross-examination of the mother; and
> >
> > iii) her advocate's closing submissions on her behalf.
>
> Whether it would have been reasonable for Cobb J to have allowed T to be present in court during the hearing I cannot tell. It would have been for the guardian to decide which of the documents filed in the proceedings should be shown to T."

35. Finally a decision in the Court of Protection by Parker J herself, *YLA v PM & MZ* [2013] EWHC 3622 (Fam), some few weeks after the present decision is illustrative of the fine line that has to be drawn between matters which can properly be canvassed within a meeting between a judge and the subject of the proceedings, and what may not. Parker J had been invited by counsel to meet the adult subject of the Court of Protection proceedings, P, to ascertain her wishes and feelings. The judge declined to do so for the following reasons:

> "I was particularly concerned from what (counsel) wrote that I was being asked to form my own assessment of the strength of her wishes and feelings: and indeed capacity. In children's cases the court sees the child for the purpose of allowing wishes and feelings to be expressed and to allow the child to feel part of the proceedings: the meeting is not to be used for gathering evidence….I thought that there was a risk that I might form a view which I was (i) not entitled to take and (ii) might be adverse to P in the sense that I formed the view that her views were repetitively expressed, the subject of influence or did not convey understanding…I note that in *CC and KK v STCC* [2012] EWHC 2036 (COP) Baker J heard evidence from KK in order to assist in the decision as to capacity. This was evidence given in the parties' presence and submissions were made as to it. Seeing P privately would not have permitted the other parties to have been part of the process."

Arguments in this appeal

36. In developing his submissions orally before us Mr Turner stressed the need for judicial clarity when a

judge meets a child during the course of on-going Hague Convention proceedings. He reminded the court that the 2010 Guidelines, at paragraph 5, stated that: "It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence…The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her".

37. Mr Turner's submission was that a line has to be drawn between allowing the child to express his or her wishes and feelings, on one side of the line, and the court setting about a process of investigation of those stated wishes and feelings, for example to analyse the rationality of the child's view, which, he submitted, is on the other side of the line. The mother's case was that the only legitimate reason for a judge seeing a child during the actual hearing of the application is to:

    a) Reassure the child that she is an autonomous individual;

    b) Reassure the child that the court has received an account of her wishes and feelings; and

    c) To provide the court with an opportunity to explain its role and explain that the decision at the end of the process may not necessarily be what the child has asked for.

38. Mr Turner was therefore critical of the judge's assertion (paragraph 18) that it was permissible for her "to probe what [K] said not by in effect cross-examining her but by asking her to expand and to explain". Mr Turner described the judge's description as "mere sophistry". He submitted that the court must act in a manner which is compatible with legal principle and with ECHR, Article 6 to ensure a process whereby evidence upon which the judge will, in due course, rely is only admitted as part of a process in which all parties are involved and through which the evidence can be tested on behalf of each litigant.

39. As the guidelines stress, Mr Turner submitted that the purpose of a judge meeting a child is for the benefit of the child, and not for the judge or for the wider forensic process.

40. So far as the outcome of the appeal is concerned, Mr Turner submitted that, if the appeal is successful, the case will require re-hearing at first instance.

41. Mr Teertha Gupta QC, on behalf of the child, supported the appeal. He told the court that K had found the meeting with Parker J to be "intimidating". The transcript shows that the judge asked the child some 87 questions during the course of over one hour. In her judgment the judge had characterised the process as being one in which she had been hearing K's "representations" and undertaking a process which was "in some respects akin to submissions" thereby rendering it "permissible for (the judge) to probe what (K) said…by asking her to expand and to explain." Mr Gupta submitted that such a process was not fair to the child who had been brought to court and who had not been told, in advance, that the judge was anticipating that she would be making representations or submissions.

42. Mr Gupta, in common with each of the counsel appearing before us, is extremely experienced in this field of family law. He told the court that he had never seen such a process take place in any other Hague Convention application. Stressing the summary nature of the proceedings, and the strongly held default position that no oral evidence is given, Mr Gupta submitted that it was inappropriate for the court to embark upon an extended oral examination of the child in such cases. The CAFCASS High Court team had developed an expertise in this field, and their contribution should be the channel

through which, in most cases, the child's objections and/or wishes and feelings are communicated.

43. Mr David Williams QC, for the father, submitted that, rather than acting in conflict with the guidelines, the judge had striven to conduct a process which was entirely compatible with those Guidelines. He submitted that it was entirely appropriate for the judge to hold a meeting, that the Guidelines permitted a judge to take account of what was said during the meeting and the judge was therefore entitled to evaluate K's objection to a return in the light of what she had heard during their encounter.

44. Mr Williams reminded the court that in consequence of the decision of the House of Lords in *Re D* in 2006, prior to which it was unusual for children to be seen by a CAFCASS officer in child abduction proceedings, a sea-change occurred and all children over the ages of six or seven are now routinely interviewed by the specialist CAFCASS High Court team. In addition there has been greater willingness amongst judges to meet children. Further, it is acceptable for the contribution made by a child during such a meeting to be regarded as "evidence". In support of that latter submission Mr Williams took the court to paragraph 44 of Sir Mark Potter's judgment in *De L v H* in which the President lists the "evidence" he has received citing as item (iv) the "lengthy conversation with R".

45. Pausing there, there is a danger, in our view, in placing undue weight on the use of the word "evidence" in that lengthy paragraph. Later in the same judgment, at paragraph 65, Sir Mark Potter describes the purpose of the meeting as being to ensure "that [the child] understood the nature of the court's tasks and the constraints imposed upon it in reaching its decision".

46. Mr Williams asked the court to contemplate a situation where a judge neutrally asks the child if he or she wishes to say anything, and the child then goes on to add to, clarify or otherwise alter the previously recorded statement of wishes and feelings that had been given to the CAFCASS officer. He accepted that the meeting should not be *for the purpose of* gathering evidence, but the very process of "hearing the child", despite the judge taking a neutral or passive role, might involve receiving some additional evidence. That submission caused this court to question whether this judge had in fact been neutral or passive in the way she had conducted the meeting. We questioned whether the process as deployed here gave the judge a dynamic role, rather than a passive role, and whether the series of questions from the judge were in fact plainly designed to elicit more information. Mr Williams conceded that the questions recorded in the transcript of the interview, at certain stages, were designed to elicit information. But, he argued, the judge was entitled to do her best to understand the strengths and weaknesses of the position described by the child.

47. In reliance upon the decisions of Thorpe LJ in *Re G* and *Re J* Mr Williams made the bold assertion that it was for the judge to undertake the task of evaluating the wishes and feelings, and not the CAFCASS officer.

48. During his short submission in response, Mr Turner stressed that "hearing the voice of the child" does not equate to a requirement for the judge to meet the child. He argued that the observations of Thorpe LJ in *Re G* and *Re J* were not made within the context of the judge embarking upon a process of actively gathering evidence.

49. He concluded by submitting that the primary focus should be upon establishing and maintaining a fair trial process which is compatible with the Common Law and with ECHR Article 6.

Discussion

50. In stating that 'it cannot be stressed too often that the child's meeting with the judge is not for the

purpose of gathering evidence' the *Guidelines* indicate that there is a firm line to be drawn between a process in which the judge and a young person simply encounter each other and communicate in a manner which is not for the purpose of evidence gathering, and a process in which one of the aims of the meeting is to gather evidence. In so stating the *Guidelines* are not at odds with any of the reported cases to which reference has already been made.

51. Care needs to be taken in distinguishing between the two processes. In contrast to a meeting which is not for the purpose of gathering evidence, where it is considered that a child should provide evidence in the proceedings, upon which the court will rely, any process must respect the ECHR, Art 6 rights of the parties and must accord with the 'overriding objective' in Family Procedure Rules 2010, r 1.1 which is 'to deal with cases justly, having regard to the welfare issues involved' (r 1.1(1)) which involves, so far as is practicable, inter alia, 'ensuring that [a case] is dealt with expeditiously and fairly' (r 1.1(2)(a)) and 'ensuring that the parties are on an equal footing' (r 1.1(2)(c)).

52. It is to be acknowledged that courts in this jurisdiction are, rightly, still feeling their way forward in order to determine how best to 'hear' the voice of a child who is the subject of an application under the Hague Convention. What is, or is not, the appropriate channel through which a child is heard will differ from case to case, and the manner in which the task is undertaken will depend upon the developing skill and understanding of the judge and the other professionals involved. It is therefore right that the *Guidelines* are no more than they purport to be, namely guidelines. In like manner nothing that we may say in this judgment should be taken as more than a description of the approach to hearing the voice of a child in such cases that is currently endorsed by judicial authority. Our collective understanding of these matters and how best to 'hear' a young person within the court setting, is developing and is still, to an extent, in its infancy. It is not our aim to say anything that may set current practice in concrete or otherwise prevent discussion, thought and the further development of good practice.

53. With those caveats in mind, it is possible to draw together a number of themes which are common to each of the authorities to which we have made reference:

    a) There is a presumption that a child will be heard during Hague Convention proceedings, unless this appears inappropriate (*Re D)* ;

    b) In this context, 'hearing' the child involves listening to the child's point of view and hearing what they have to say (*Re D*, para 57; *JPC v SLW and SMW*, para 47);

    c) The means of conveying a child's views to the court must be independent of the abducting parent (*Re D*, para 59);

    d) There are three possible channels through which a child may be heard (*Re D*, para 60):

        i) Report by a CAFCASS officer or other professional;

        ii) Face to face interview with the judge;

        iii) Child being afforded full party status with legal representation;

    e) In most cases an interview with the child by a specialist CAFCASS officer will suffice, but in other cases, especially where the child has asked to see the judge, it may also be necessary for the judge to meet the child. In only a few cases will legal representation be necessary (*Re D*, para 60);

f) Where a meeting takes place it is an opportunity (*JPC v SLW*, para 47; *De L v H*, para 45; *Re J* [2011], paras 31 to 40):

i) for the judge to hear what the child may wish to say; and

ii) for the child to hear the judge explain the nature of the process and, in particular, why, despite hearing what the child may say, the court's order may direct a different outcome;

g) a meeting between judge and child may be appropriate when the child is asking to meet the judge, but there will also be cases where the judge of his or her own motion should attempt to engage the child in the process (*Re J* [2011], paras 31).

54. None of the reported cases goes further than the guidelines by suggesting that a judicial meeting might be used for the purpose of obtaining evidence from the child or going beyond the important task of simply hearing from the child that which she may wish to volunteer to the judge. As Lord Wilson SCJ describes in *Re LC* at para 55, where a child's evidence might prove determinative of an issue, it may be adduced by an appropriate process into the full proceedings by witness statement, report from a CAFCASS officer or, where the child is a party, by her advocate's cross-examination of the adult parties and closing submissions. Going further, where oral evidence is required, Lord Wilson indicated that an age appropriate process should be deployed.

55. In the present case Parker J, in accordance with the *Guidelines* and the authorities, is clear that she was not hearing 'evidence' from K during their meeting and she, as the judge, was not cross-examining her. As her explanation of the position in the related circumstances of COP proceedings in *YLA v PM & MZ* demonstrates, Parker J well understood that the purpose of a meeting with a child is to allow wishes and feelings to be expressed and to allow the child to feel part of the proceedings; 'it is not to be used for evidence gathering'. This is not, therefore, a case where the judge was purporting to develop the previously accepted approach or to move the dividing line so clearly described in the *Guidelines* between hearing the child and gathering evidence. In addition, none of the parties before this court submits that that dividing line should be re-drawn. The central question in the present appeal, therefore, is whether the process that was in fact deployed and then relied upon by Parker J fell, in a manner contrary to her own self-direction, on the wrong side of the line.

56. Despite having great respect for this judge, who is highly experienced in the conduct of proceedings where the voice of the child needs to be heard, our conclusion is that on this occasion the conduct of the judicial interview did indeed fall on the wrong side of the line. Having summarised the submissions of Mr Turner and Mr Gupta, with which we agree, we can set out the reasons supporting this conclusion in short terms as follows:

i) During that part of any meeting between a young person and a judge in which the judge is listening to the child's point of view and hearing what they have to say, the judge's role should be largely that of a passive recipient of whatever communication the young person wishes to transmit.

ii) The purpose of the meeting is not to obtain evidence and the judge should not, therefore, probe or seek to test whatever it is that the child wishes to say. The meeting is primarily for the benefit of the child, rather than for the benefit of the forensic process by providing additional evidence to the judge. As the *Guidelines* state, the task of gathering evidence is for the specialist CAFCASS officers who have, as Mr Gupta submits, developed an expertise in this field.

iii) A meeting, such as in the present case, taking place prior to the judge deciding upon the central issues should be for the dual purposes of allowing the judge to hear what the young person may wish to volunteer and for the young person to hear the judge explain the nature of the court process. Whilst not wishing to be prescriptive, and whilst acknowledging that the encounter will proceed at the pace of the child, which will vary from case to case, it is difficult to envisage circumstances in which such a meeting would last for more than 20 minutes or so.

iv) If the child volunteers evidence that would or might be relevant to the outcome of the proceedings, the judge should report back to the parties and determine whether, and if so how, that evidence should be adduced.

v) The process adopted by the judge in the present case, in which she sought to 'probe' K's wishes and feelings, and did so over the course of more than an hour by asking some 87 questions went well beyond the passive role that we have described and, despite the judge's careful self-direction, strayed significantly over the line and into the process of gathering evidence (upon which the judge then relied in coming to her decision).

vi) In the same manner, the judge was in error in regarding the meeting as being an opportunity for K to make representations or submissions to the judge. The purpose of any judicial meeting is not for the young person to argue their case; it is simply, but importantly, to provide an opportunity for the young person to state whatever it is that they wish to state directly to the judge who is going to decide an important issue in their lives.

57. It is therefore necessary to consider whether the material gleaned by the judge during her, as we find, contaminated interview with K influenced the judge's decision to order K's return to Malta.

58. In the central section of the judgment [paragraphs 33 to 63] in which the judge analysed K's objections, Parker J recorded that the content of what K said to the CAFCASS officer was very similar to what was said to the judge. The difference between the CAFCASS officer's recommendation against an order for return to Malta and the judge's decision to the contrary is explained by the judge finding that the officer had responded to K's very passionate and emotional expression of her views without the officer evaluating what K has actually said. The judge's evaluation is that K was very confused in her reasoning and could not objectively justify an objection to returning to Malta [paragraph 52]. The judge did not accept that K objected to a return on 'any cogent or rational grounds' and she concluded that there was no clarity about her reasons.

59. The CAFCASS officer's evidence does not contain any evaluation of rationality or cogency. Whilst it is correct that what K said to the officer and to the judge was in similar terms, the difference between the two processes is that during the judicial interview the judge sought to probe and to tease out what, if any, reasons there were behind K's stated views. In this manner we consider that the conduct and the content of the interview achieved a pivotal status in the judge's evaluation of the case. It can only have been during, and as a result of, that process that the judge came to the central conclusion in her analysis of the case, namely that the child's wishes and feelings, whilst passionately and emotionally expressed, lacked any rationality. Put another way, the judicial interview provided key evidence upon which the judge relied in coming to her conclusion. For the reasons that we have already explained, the judge was in error in approaching her meeting with K in this manner. The material gleaned from their encounter goes to the heart of the judge's analysis and, in consequence, that analysis cannot stand and must, reluctantly, be set aside by allowing the appeal.

60. In a case that has already been unduly delayed at every stage, the prospect of a re-hearing before a

different judge is not one that will be welcomed by anyone. That said, we are afraid that, regrettable though it is, a re-hearing is the only possible outcome.

61. We would therefore allow the appeal, set aside the judge's order for the return of K to Malta and direct that the case be re-heard before a different judge of the Family Division at the earliest opportunity.
