Neutral Citation Number: [2023] EWCA Civ 1047

Case No: CA-2023-001052

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
MR DEXTER DIAS KC
SITTING AS A DEPUTY HIGH COURT JUDGE
FD22P00086

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 September 2023

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LADY JUSTICE ELISABETH LAING

Re D (A Child) (Abduction: Child's Objections: Representation of Child Party)

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James Turner KC, Edward Bennett and Natasha Miller (instructed by **International Family Law Group LLP**) for the **Appellant**
Michael Gration KC and Michael Edwards (instructed by **Ian Walker Family Law and Mediation Services**) for the **First Respondent**
Jason Green, Professor Rob George and Fazeela Ishmael (instructed by **Hunters Law LLP**) for the **Second Respondent**
Deirdre Fottrell KC, Lorraine Cavanagh KC, Siobhan F. Kelly and Sharon Segal (instructed by **ITN Solicitors**) for the **Association of Lawyers for Children,** the **First Intervener**
Henry Setright KC and Harry Langford (instructed by **Mills and Reeve LLP**) for the **Reunite International Child Abduction Centre,** the **Second Intervener**

Hearing dates: 25 and 26 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. These proceedings concern an application under the 1980 Child Abduction Convention ("the 1980 Convention"). The parties are the Applicant mother, the Respondent father and the child, D, who was joined as a party to the proceedings. D acts through Mr James Netto, his solicitor, who was also appointed by the court as his guardian in the proceedings.

2. D appeals from the return order made on 26 May 2023 by Mr Dexter Dias KC, sitting as a Deputy High Court Judge ("the judge"). The judge found that D objected to being returned to Singapore but exercised his discretion by making a return order.

3. The broad issue which potentially appeared to be raised by this appeal was the role of a solicitor who is also acting as a child's guardian (a role which I give the shorthand, "solicitor-guardian") in 1980 Convention proceedings. In particular, are there constraints on the scope of the evidence they can give, for example as to their assessment of the strength or source of a child's views, either legally or, if not legally, as a matter of practice?

4. The broad nature of this issue led to both Reunite International Child Abduction Centre ("Reunite") and the Association of Lawyers for Children ("the ALC") applying, and being given permission, to intervene by way of both written and oral submissions, for which I am extremely grateful. It also led to this appeal being listed together with the appeal from Theis J's decision in *C v M and another* [2023] EWHC 1182 (Fam) ("*C v M*"), an appeal which appeared to raise the same issue. Judgment in the latter case has not yet been handed down and I propose to deal with Reunite's and the ALC's submissions in that judgment because that appeal raises this issue more directly than does this appeal.

5. The main challenge advanced by D in this appeal is to the judge's treatment of Mr Netto's evidence. There are three grounds of appeal:

   (1) The judge erred in his approach to the role of a solicitor who is also acting as guardian in proceedings under the 1980 Convention and, as a result, wrongly attached no or negligible weight to the opinions expressed by Mr Netto as to, in particular, the extent to which D's views were influenced by his father;

   (2) The judge erred in attaching little weight to the views of a *Gillick*-competent child on the basis that he had been exposed to the father's undue influence;

   (3) The judge was wrong in the approach he took to D's welfare when exercising his discretion.

6. At the hearing of the appeal D was represented by Mr Turner KC, who did not appear at the hearing below, with Mr Bennett, who did appear at the substantive hearing below, and Ms Miller, who attended the hearing below to take the judgment, with the skeleton argument for the appeal having been drafted by Mr Harrison KC and Mr Bennett; the father, who acted in person below, was represented pro bono by Mr Green and Ms Fazeela Ishmael (with a skeleton argument drafted by Mr Green and Mr George); and the mother was represented by Mr Gration KC, who did not appear below, and Mr Edwards.

Background

7. The background, in brief, is as follows.

8. The father is a UK national. The mother is a national of South Korea. They married in 2000 in Hong Kong SAR. In 2007, they moved to live in Singapore. D, who is now aged 13, effectively lived his whole life in Singapore until his wrongful retention by the father in January 2023 when D was in England on holiday visiting the father.

9. The mother and the father separated in 2014. The parents appear to have been engaged in extensive litigation in Singapore about D and other matters (divorce and financial) since then. During this period D lived with or spent extensive time with each parent until the father moved to live in England in late 2020.

10. Prior to his leaving Singapore, the father applied to relocate with D to England. His application was granted at first instance in December 2018. The mother appealed and her appeal was allowed in August 2019 with the relocation order being set aside.

11. In October 2020, the Singapore court made a joint custody order with the mother having sole care and control and the father having extensive access. Very shortly after this order was made the father moved to England. The father's appeal from this order was dismissed in August 2021. In November 2021, the order was varied to provide that the mother should have sole custody.

12. In December 2022, an order was made by the Singapore court permitting D to travel to see the father in England between 17 December 2022 and 6 January 2023. The intention was, and the order provided, that the mother would accompany D and stay in England and that the father would pay for her flights and accommodation. However, when the time came, the mother was ill, with the result that D travelled on his own.

13. On 6 January 2023 the father told the mother that D had "decided to stay" in England.

14. The mother immediately applied to the Central Authority in Singapore.

15. On 1 February 2023, the father contacted Mr Netto and told him that D was refusing to return to Singapore. The father suggested that Mr Netto speak with D, which he did, by telephone on 1 February 2023. They spoke for almost one hour. They next spoke, again by telephone, on 13 February 2023. Mr Netto then wrote to both parents setting out a summary of D's wishes and feelings as relayed to him, namely that D wanted to stay in England and that it was "my present view that he is competent to instruct a solicitor directly, and that he is very clear about what he wants". Mr Netto and D continued to communicate by WhatsApp.

Proceedings

16. The mother's application was issued on 15 February 2023. This was supported by a statement by her solicitor setting out a very brief summary of the background, as is typical in such proceedings.

17. The first hearing was listed for 22 February 2023. The mother's solicitors gave Mr Netto notice of this hearing.

18. On 21 February 2023, an application was issued for D to be joined as a party to the proceedings with a statement in support from Mr Netto which set out details of the information given to him by D and his assessment of D's maturity and level of understanding of the issues involved in the proceedings. It also suggested, "respectfully", that the court would be best able to "determine [D's] objections to returning to Singapore" if he was joined as a party. Mr Netto indicated that he was "particularly conscious that [D's] mother alleges that he has been influenced by his father in the past" and again suggested that evidence in relation to this issue would be "best provided" by D.

19. The first hearing took place before a Deputy High Court Judge on 22 February 2023. The information available to the court was as described above and was, therefore, extremely limited. The mother opposed the application but D was joined as a party and Mr Netto was appointed as D's guardian. We do not have any note or transcript of the judgment but we have been told that the judge considered PD 16A of the Family Procedure Rules 2010 ("the FPR 2010") and the three authorities to which he was referred, namely *Re M (Abduction: Rights of Custody)* [2008] 1 AC 1288 ("*Re M*"); *Re LC (Reunite International Child Abduction Centre intervening)* [2014] AC 1038 ("*Re LC*"); and *Ciccone v Ritchie* [2016] 4 WLR 60 ("*Ciccone*").

20. The parents were ordered to file written statements, as was Mr Netto. The order did not limit the nature of the evidence to be given by Mr Netto. A Cafcass report was also ordered to address: whether D objected to returning to Singapore; whether his objections were authentic; and, if D did object, whether those objections coincided with or were at odds with his welfare.

21. The mother filed statements dated 3 March, 28 March and 15 May 2023. The father filed a statement dated 17 March 2023.

22. The Cafcass Officer, Ms Cull-Fitzpatrick, met D on 3 April 2023 and provided a Report dated 11 April 2023. For the purposes of preparing her report she had the court bundle, the statements from the parents (other than the mother's third statement) and Mr Netto's first statement. D understood that he was meeting her "to share his wishes and feelings" but the Cafcass Officer considered that D only "had a vague understanding of the decision the court would be making on his behalf". She, therefore "explained this to him in detail". Ms Cull-Fitzpatrick considered that D's maturity was "commensurate with his chronological age".

23. The Report sets out an account of what D told the Cafcass Officer which included that his father had told D that "the Judge cannot make him return to Singapore because he is a British citizen, so both him and his father are confident that this will not happen". As explained in her Report, Ms Cull-Fitzpatrick considered that the father "has been the driving force of [D's] involvement within the extension of the litigation". She then said:

> "I do not believe that [D] had been provided with a set narrative, he freely answered the questions without hesitation, and he was balanced within his views about his life in England and Singapore, as well as his relationships with his mother and father. [D] told me that his father did not tell him to stay in England and he felt able to return to Singapore, if he wanted to.

> However, [D's] decision to remain in England was a direct result from the conversations he had with his father, as stated by [D] himself. [The father] portrayed a return to Singapore as temporarily severing their relationship, and he has portrayed the only way of them all living close to one another as being in England. It is evident that there are elements of [the father's] behaviour which has resulted in [D's] decision to remain in England."

24. Mr Netto filed a second statement dated 9 May 2023 which set out an extensive account of what D had said to him when, for the first time, they met in person. Mr Netto also set out his impressions of D including his assessment of whether D had been "influenced by his father".

25. At the final hearing, the judge heard oral evidence from the Cafcass Officer and Mr Netto. I would also note that, prior to the issue being raised by the judge, no party objected to the evidence which Mr Netto had given in his statements, including extensive evidence as to his own views of the nature and strength of D's views. The mother did not initially seek to cross-examine Mr Netto although her counsel did cross-examine him once the issue had been raised and he was permitted to give oral evidence. However, I repeat, no party raised any concern about the nature of Mr Netto's evidence until this issue was raised by the judge during the course of the final hearing.

Judgment

26. The judge briefly summarised the background facts, the procedural history, the law on a child's objections under the 1980 Convention. He then, also briefly, summarised the evidence of the Cafcass Officer and Mr Netto and set out his assessment of them as witnesses, which was as follows:

> "Ms Cull-Fitzpatrick was a fair and balanced witness. She was thoughtful and authoritative as a child professional. In terms of Mr Netto, I have absolutely no reason to doubt his honesty. He gave evidence about the child's wishes and feelings. He then went one stage further and offered opinions about the child, his emotional state and presentation. *I must consider the legal status and appropriateness of this evidence in due course*. Mr Netto says he is entitled to give this evidence; this is disputed by the M." (emphasis added)

The issue I have highlighted went on to form a significant part of the judgment.

27. The judge's summary of Ms Cull-Fitzpatrick's evidence included the following:

> "She agrees there was relentless pressure on the child from his father. She agrees the content of F's messages to the child was highly manipulative. When she was asked about the messaging I mentioned at the outset of this judgment … she said that the F's responses … were not mindful of the child. She agreed she was "shocked" by F's messages and these were worrying. She was concerned about the long-term consequences on the child. She

> was concerned about the situation he has been placed in and the impact this has had upon him. However, she did not think that F had given him a set narrative. The conversation that F had with the child in England had, in her judgment, influenced his decision. That was a conversation in which F told the son that if he (the Child) went back to [Singapore] the F would not see his son for several years."

Ms Cull-Patrick's assessment was that D's views were "not a strong objection [to returning to Singapore], but that he would prefer to stay here".

28. Mr Netto's evidence included his assessment that D "strongly objects to returning to" Singapore. The judge considered that Mr Netto "unquestionably took the time to establish the views of the child in the meetings he had with the child". However, as referred to above, the judge was concerned about the "appropriateness" of Mr Netto giving "a number of opinions about the child's motivation and his assessment of it". He addressed this issue later in his judgment, as set out below.

29. The judge dealt with the issue of D's objections under five headings:

> "a) Solicitor-Guardian opinion evidence;
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> b) Authenticity of the child's wishes and feelings and decision;
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> c) Whether there is an objection and if so how strong;
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> d) Any welfare issues if relevant;
>
> e) Evaluation of relevant factors."

30. In the first section, which I summarise in some detail, the judge dealt at considerable length with the fact that Mr Netto had given "opinion evidence". This included Mr Netto's interpretation of what D had said and his opinion as to certain matters such as the strength of D's objection to returning to Singapore and whether D had been influenced by his father.

31. As to whether D had been influenced by his father, Mr Netto "was genuinely alarmed by the contents of some of the messages that [D's] father had sent him" and acknowledged that "it would be naïve to think that the messages would have no effect on him". However, Mr Netto was "left with the strong impression that [D], in effect, [had] taken them with a pinch of salt" and considered that D "has made it patently clear that his views are his own". Mr Netto considered that D's views were thoughtful and balanced and that his views were his own.

32. The judge referred to *Ciccone* (which I quote below) and to *C v M* which Mr Bennett had provided after the hearing. The judge did not consider he was assisted by the latter decision because "the issue of principle about the legitimacy of opinion evidence" from a solicitor-guardian was not argued.

33. The judge drew the following conclusions from the decision in *Ciccone*:

> "MacDonald J is a leading judge in this field. He has made it clear that the task of assessing matters such as welfare and authenticity, or its obverse, undue influence, lie 'properly' with the Cafcass officer. The reason is plain: a Cafcass officer is trained in welfare of a child and assessment. A solicitor is not. The job of a Solicitor-Guardian is two-fold: first, to receive and report the views of her or his client to the court; and second, to advocate the child's position on the child's behalf. Advocates should not be giving their opinions to the Court; they make submissions about the opinions of other people and about the evidence. It is this confusion which lies at the heart of the problem with Mr Netto's evidence. *It seems to me that Mr Netto has been insufficiently attentive to the lines between opinion evidence and legal representation*. It is extremely unhelpful to the Court when somebody whose function is reporting evidence and advancing a child's position - whether or not through counsel - then provides opinion evidence to the court as a witness. *The difficulty as a matter of principle* is that the witness lacks the essential qualities of independence and disinterest in the outcome. It becomes almost impossible for the Court to apportion weight to the evidence when the witness is sat in court both to advance their client's case and provide an opinion which also advances the child's case." (emphasis added)

It is clear from this passage that the judge was critical of Mr Netto for having given opinion evidence. He considered that Mr Netto should not have given his "opinions"; that Mr Netto had "been insufficiently attentive to the lines between opinion evidence and legal representation"; and that Mr Netto's opinion evidence was "extremely unhelpful". This was, "a matter of principle", because Mr Netto lacked the "essential qualities of independence and disinterest in the outcome". As a result, the judge considered it "almost impossible for the Court to apportion weight to" Mr Netto's opinion evidence.

34. In support of his conclusions, the judge referred to "Opinion evidence [being] an exceptional category of evidence for a witness to adduce". He quoted a passage from Phipson on Evidence, 20th Edition at [33-01], which included that one of the grounds "more commonly assigned for the rejection of opinion evidence" is that opinions founded on inadmissible evidence are "worthless"; and that "Where non-expert opinion evidence is adduced it is inadmissible".

35. The judge then analysed whether Mr Netto had "the characteristics of specific expertise" or independence from the parties which would entitle him to give expert evidence. He concluded that he did not and, indeed, commented that to suggest that Mr Netto could be instructed "as an expert to assess children … borders on the absurd". Accordingly, Mr Netto was not "qualified to give his opinion about influence in this case". He also considered that Mr Netto had shown "a serious lack of understanding that a properly trained professional would have" because he had failed "to grasp the emotional complexities of the situation facing" D.

36. The judge quoted from guidance given by The Law Society, in a Practice Note dated 2 December 2019 in respect of "specified proceedings", to the effect that solicitors should

not act as guardians if there was a delay in the allocation of a guardian. The judge considered this "very sound advice".

37. The judge commended Mr Netto for the manner in which he had sought to ensure D's views were heard but commented that he had been "overtaken by his enthusiasm"; that "his ultimate position became untenable"; and that Mr Netto's "over-exuberance was evident". Accordingly, the judge considered that he could "place very little weight on Mr Netto's opinion evidence, even if it is admissible, about which this court has considerable doubts".

38. The judge noted that, to be fair to Mr Netto, the order of 22 February 2023 was "not explicit about the evidence from [Mr Netto] that was authorised". In addition, there had been "no root and branch objection to Mr Netto's opinion evidence before it was sought for him to go into the witness box". In response to this application, the mother objected because "the basis of the evidence Mr Netto was about to give was said to be to 'respond' to the evidence of Ms Cull-Fitzpatrick". The judge "could not see how it was legitimate for a witness to comment on the evidence of another witness, particularly when that witness is not an expert in the field". It was then proposed that Mr Netto would give oral evidence "fleshing out aspects of his own evidence", for which, "with some hesitation", the judge gave permission.

39. The judge next commented that, the "evidence having been admitted, my task is to assess its weight". He expressed his conclusion on that issue as follows:

> "In my judgment, it is negligible. The approach to exuberant experts, where they descend into advocacy, is a different matter. The approach of the Court of Appeal is instructive. Lord Justice Christopher Clark in *Hoyle v Rogers* [2014] EWCA Civ 257 at para 52 said that the approach to overreaching opinions was "*for the whole document to be before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not*". (emphasis in original)

The judge again noted that Mr Netto had "no training or qualifications in social work or child psychology" but accepted that it was "perfectly proper for Mr Netto to relay to the court the vehemence with which the child expressed his objection".

40. The judge then repeated that he had not been asked to and had not excluded the evidence, adding, "This analysis is about weight, not admissibility". The judge set out his reasons for preferring the evidence of Ms Cull-Fitzpatrick:

> "Mr Netto lacks independence and has no relevant training. Ms Cull-Fitzpatrick has a degree in social work, worked for a Local Authority and was a senior practitioner. She has worked in the Cafcass High Court team for two years. She has conducted about 30-40 Hague cases, where the wishes of children are a large part of her work professionally. Meeting children in Hague proceedings, she has specific training from Cafcass itself and the legal team. Ms Cull-Fitzpatrick is highly qualified, independent and an expert specially qualified precisely in these assessments.

> There is no comparison between these two witnesses. On the issue of influence, I am driven back to the evidence of Ms Cull-Fitzpatrick. It must be carefully assessed in the context of the totality of the evidence. I have carefully considered both her report and her persuasive and extensive oral testimony. I found it focused, balanced, authoritative and impressive. I have no issue strongly preferring the evidence of Ms Cull-Fitzpatrick to Mr Netto on influence."

41. On the next issue, of "(b) authenticity", the judge accepted that D was "not simply parroting the views of" his father: "To remain in England is the child's view". However, he concluded that D had been "heavily and unduly influenced by the father, particularly through text messages and communications once he arrived here". The judge then set out, over nearly five pages, an account of some of the text messages between the father and D between January 2021 and October 2022. I do not propose to set them out in this judgment but they were rightly described by Ms Cull-Fitzpatrick and the judge as "shocking". The judge added that the messages showed that the father had "used emotional manipulation", with "the inducement of material goods" and with "threatened sanctions". The judge's ultimate conclusion was as follows:

> "The court concludes therefore that the child's decision to stay and his wishes and feelings about it are heavily influenced by the pressure and emotional manipulation of his F. Ms Cull-Fitzpatrick's judgement was that there was "relentless pressure" from F which was highly manipulative. I judge all of this cumulatively has been a major contributory factor in the evolution of the child's views. That is not to discount other matters such as sports, competition, new school and life here generally. It is possible that the child thought about living in England whilst in [Singapore], that is obvious from the texts as well as Mr Netto's evidence. But I judge that a highly significant contributing factor has been the undue influence of the F and the persistence of narrative which F has shared with his son."

42. When dealing with the next issue, "(c) Whether there is an objection and if so how strong", the judge concluded that D did object to returning to Singapore. This conclusion is not challenged. The judge noted that there was "undoubtedly a difference between the strength of [D's] views expressed to Ms Cull-Fitzpatrick in March and when he spoke to Mr Netto in April" but considered that this could not "be divorced from the question of undue influence". He then set out his assessment of what lay behind D's views:

> "[81] The texts are shocking. The threat of separation wholly inappropriate and deeply emotionally manipulative. One must step back and be reminded that when these messages started this child was 11; when he got here he was 12. It is clear from the tone of the messages, but also from the father's forceful and assertive presentation in court, that he is a powerful presence and the child is under his sway, living exclusively with him and dependent on him, and will find it difficult to resist his influence. The child's objection has strengthened from March to April, but

> his views have been and continue to be influenced by the inescapable pressure made by his F and the threat of separation.
>
> [82]. The Court is little impressed by the point made that the child was unable to open up sufficiently with Ms Cull-Fitzpatrick. It seems to me if the child had very strong preferences in early March, there is no reason he could not have expressed them to Ms Cull-Fitzpatrick. He was able to tell her many difficult things. It is right that he was not confident, but he was able to criticise both parents to her. What happened is that the child's wishes and feelings have become more strongly aligned with F's ulterior ambitions. Thus the court places less weight on the increase and the strength of the objection, in the context of F's inappropriate messaging and his threat of separation from the child."

43. On the issue of (d) Welfare, the judge decided that there was "no material welfare risk to a return" and "no welfare concerns that are material". This was partly in response to what the judge described as the father seeking "to enlist the court in a wholesale welfare enquiry".

44. The judge lastly addressed, (e) Relevant Factors in the exercise of his discretion. He listed factors against return which comprised D's age and maturity; the strength of his objections; his relationship with his father; and D's wish that his parents would both live in England. He then listed the factors in favour of return which comprised D's relationship with his mother; the extent to which D's views had been influenced by his father; the potential effect on contact between D and his mother and on the relationship more generally having regard to the father's "hostility" to the mother; policy issues including the fact that the father had "exploited court-sanctioned holiday arrangements to further his scheme" which was a "stark breach of the Hague Convention, for which he is not apologetic and completely without insight on the damaging effect on his son"; the court in Singapore being better placed to make welfare decisions; and the promptness with which the mother had made the application. The judge's conclusion was that the factors in favour of a return "significantly outweigh" the factors against refusing a return order.

Submissions

45. I only propose to set out a brief summary of the parties' respective submissions.

46. In his oral submissions, Mr Turner focused on the first ground of appeal. He acknowledged that the father's conduct had been criticised heavily below by the other parties and the judge. However, he submitted that this did not reflect D's focus and that, from D's perspective, the judge had effectively "stifled" his voice. The judge had been distracted from properly analysing the true strength and nature of D's objections by the manner in which he discounted Mr Netto's evidence. As set out in the Skeleton Argument, it was submitted that, although the judge had not excluded Mr Netto's evidence and had said that it was "about weight, not admissibility", this was "a distinction without any material difference as it is plain that the judge considered that Mr Netto had strayed beyond his functions in offering any opinion evidence". This had the consequence that "the opinion of [D's] guardian – formed on the basis of more

recent and extensive dealings with [D] than the Cafcass officer – was essentially disregarded on a basis that was wrong". Mr Turner submitted that this tainted the judge's assessment of Mr Netto's evidence such that his decision was flawed.

47. Mr Turner submitted that Mr Netto was not giving, and was not seeking to give, evidence as an expert. He was giving his opinion as to the quality and nature of D's objections, based on his conversations with D, which were matters on which he was entitled to give evidence. He was entitled to give this opinion evidence pursuant to the provisions of s.3(2) of the Civil Evidence Act 1972 ("the CEA 1972"). It was also pointed out that, under r. 16.6(3) of the FPR 2010, it is an "essential function" of a solicitor instructed by a child to assess the child's capacity and competence to give instructions. This requires a solicitor to undertake a "multi-faceted assessment which includes evaluating whether the child's instructions are the product of influence of another person, typically a parent". It was also submitted that, although solicitor-guardians do not have the same expertise and training as Cafcass Officers, they have "a different expertise which can be just as valuable to the court in evaluating a child's objections".

48. As to the second ground of appeal, it was submitted that the judge was wrong to attach "minimal weight" to D's objections. This was inconsistent with his conclusion that D's views were his own and failed properly to recognise the quality of D's "highly balanced and reflective analysis". Although not pressed during the course of the hearing, in the written submissions, it was submitted that a court should not "readily override the authentic views of a *Gillick*-competent child even where the child has been subject to inappropriate influence by one of his parents". In support of the latter submission, reliance was placed on *AS v CPW* [2020] 4 WLR 127.

49. On the third ground of appeal, it was submitted that, by focusing on welfare concerns or risks, the judge had failed to undertake a sufficiently broad analysis of the relevant issues such as the effect on D of being required to return to Singapore.

50. Mr Green, on behalf of the father, submitted that the manner in which questions as to the admissibility of Mr Netto's evidence and the appropriate role, as a matter of principle, of a solicitor-guardian arose undermined the fairness of the hearing and the soundness of the judge's decision. The mother's counsel had not sought to rely on *Ciccone* nor had he (initially) sought to cross-examine Mr Netto. These issues had not been raised or mentioned until they were raised by the judge during the course of the hearing, which had had the following consequences. It had led the judge, wrongly, to attribute no or negligible weight to Mr Netto's evidence. The judge had effectively fettered his assessment of Mr Netto's evidence and had failed to consider it on its merits. Mr Netto had had no warning that aspects of his evidence would be challenged or criticised in the way in which they were and had been given no adequate opportunity to address this. There had also been no proper opportunity for the parties to address the legal issues raised by the judge.

51. Mr Gration set out the context of the dispute in this case, including that D had been retained by the father on the first court sanctioned holiday visit to England. He submitted that the father had engaged in a "sustained and aggressive course of conduct" in respect of D, which D had found "deeply distressing" and which had placed D under "very considerable pressure". He also submitted that there had been, what he

characterised as a "series of missteps" in this case starting with D being joined as a party.

52. D had been joined as a party at the first hearing when, Mr Gration submitted, neither the court nor Mr Netto had sufficient knowledge of the background circumstances properly to decide whether it was in D's best interests to be joined. He submitted that, even then, there were sufficient "red flags" to raise concerns as to whether D should be involved in the proceedings in this way. Any decision on the application should have been postponed including, in particular, so that a Cafcass Officer could address the issue.

53. Mr Gration submitted that the issue of the proper role of a solicitor-guardian was not engaged in this appeal. The judge had not been asked to exclude Mr Netto's evidence and it was not submitted that it was not admissible. The judge had not excluded Mr Netto's evidence, he had assessed it and had decided what weight to give it. The judge had preferred the evidence of the Cafcass Officer as he was entitled to do, as set out in his judgment.

54. There were, Mr Gration submitted, numerous reasons why the judge was right to attach limited weight to Mr Netto's evidence in respect of parental influence. These included that Mr Netto had no training or expertise to assess this issue; that there was contradictory evidence from the Cafcass Officer who, conversely, has extensive training and expertise; that Mr Netto's evidence conflicted with other evidence and with common sense; and that Mr Netto's evidence "crossed the line" identified by MacDonald J in *Ciccone*. Further, D's voice had not been "stifled", as submitted by Mr Turner. It had been "heard loud and clear" through the Cafcass report; the Cafcass Officer's oral evidence; the reporting of D's views by Mr Netto; and the advocacy of his views at the hearing which included cross-examination of the Cafcass Officer.

55. Mr Gration made brief submissions on the role of a solicitor-guardian. He submitted that there was, at least, scope for there to be a conflict between their role as a solicitor and their role as a guardian. A solicitor was bound by their instructions while it was the role of a guardian to undertake a welfare analysis. He suggested that it was more appropriate for a solicitor-guardian in Hague Convention cases to be confined to their role as a solicitor and for Cafcass to provide expert opinion evidence when required.

Legal Framework

56. I propose to deal in more detail with the questions raised about the role of a solicitor-guardian in proceedings under the 1980 Convention in the other appeal heard at the same time as this appeal. As referred to above, Mr Gration did not submit that Mr Netto's opinion evidence was inadmissible whereas this submission was made on behalf of the Appellant in respect of the evidence in the other appeal.

57. I would first want to emphasise that, as stated in paragraph 3.6 of the Practice Guidance on Case Management and Mediation of International Child Abduction Proceedings, issued by Sir Andrew McFarlane P on 1 March 2023, "In only a very few cases will party status [for a child] be necessary". The child's voice is heard sufficiently through a report from a Cafcass Officer. This was referred to by Lady Hale in *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, at [60], when she said that "Only in

a few cases will full scale legal representation be necessary", and the position has not changed since then.

58. This can be seen from, for example, the following authorities. In *Re LC*, Lord Wilson referred to the provisions of PD 16A of the FPR 2010:

> "50. When on 6 April 2011 the Rules came into force, the opportunity was taken to supplement Part 16 with Practice Direction 16A. Guidance is there given about the circumstances in which it is appropriate to grant party status to a child in family proceedings. The reader of it must again bear in mind that it is not focussed on Convention proceedings but much of it is directly apposite to them.
>
> 51. Thus paragraph 7.1 of the Practice Direction makes clear that a grant to a child of party status will be made only in cases which involve an issue of significant difficulty and thus only in a minority of cases. Consideration, so it suggests, should first be given to whether an alternative course might be preferable; and the suggestion is well reflected by the court's current practice of inviting an officer in the CAFCASS High Court team to see the child before it decides whether to make her a party to Convention proceedings."

In *Re P (Abduction: Child's Objections)* [2020] 3 FCR 213, in my judgment (with which Patten and King LJJ agreed) I said:

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

The Family Procedure Rules 2010

59. Part 16 of the FPR 2020 deals with the representation of children. It sets out "when the court will make a child a party in family proceedings". Proceedings under the 1980 Convention are "family proceedings" (pursuant to a number of provisions, including s.75(3)(b) of the Courts Act 2003).

60. Rules 16.2 and 16.4 apply to proceedings under the 1980 Convention, because they are neither "specified proceedings" nor proceedings to which Part 14 applies. Rule 16.2(1) provides:

> "(1) The court may make a child a party to proceedings if it considers it is in the best interests of the child to do so."

Rule 16.4(1) provides:

> "(1) … the court must appoint a children's guardian for a child who is the subject of the proceedings … if –
>
> …
>
> (c) the court has made the child a party in accordance with rule 16.2".

61. Rule 16.5 deals with the "Requirement for a litigation friend" and provides that, except in proceedings under s. 55A of the Family Law Act 1986:

> "… where a child is –
>
> (a) a party to proceedings; but
>
> (b) not the subject of those proceedings,
>
> the child must have a litigation friend to conduct proceedings on the child's behalf."

This provides that, where, as in the present case, the child *is* the subject of the proceedings, they do not have to have a litigation friend.

62. Rule 16.6(1) provides that "a child may conduct proceedings without a children's guardian" when the court so permits or when a solicitor, instructed by the child, considers that the "the child is able, having regard to the child's understanding, to give instructions in relation to the proceedings". This provision, however, does *not* apply to proceedings under the 1980 Convention although it does apply to most other private law proceedings including proceedings under the inherent jurisdiction.

63. In *WF v FJ (Abduction: Child's Objections)* [2011] 1 FLR 1153 ("*WF v FJ*"), Baker J (as he then was) considered, at [21]-[22], the provisions in the previous rules dealing with the joinder of a child as a party in respect of proceedings under the 1980 Convention. A child had been joined as a party. The rules did not permit a child to instruct a solicitor directly in such proceedings, although this was the effect of the order which had been made. This was, however, permitted by r.9.2A of the Family Proceedings Rules 1991 which, in so far as relevant, was in similar terms to r.16.6 of the FPR 2010 (including that it did not apply to proceedings under the 1980 Convention).

64. Baker J considered this to be an anomalous lacuna because the effect was that a child could instruct a solicitor directly in summary return proceedings under the inherent jurisdiction but not summary return proceedings under the 1980 Convention. He took "the pragmatic approach" of appointing the solicitor acting for the child as her litigation friend while expressing the hope that this situation would be considered by the Family Procedure Rules Committee "in the near future". I would also note that, at [25], he said:

> "Without wishing to lay down any rigid rules, it seems to me clearly preferable, where the time and resources permit, for the child to be seen by the Cafcass High Court Team before any decision is taken as to party status."

65. It does not appear that the issue was considered by the Rules Committee because, although the structure of the FPR 2010 in respect of the representation of children is not the same as that under the previous rules, when r.16.4 applies, as it does in the present case, the position remains that the child must have a guardian. This is because, as referred to above, r.16.6 does not apply to proceedings under the 1980 Convention.

66. This anomaly was referred to by Lord Wilson in *Re LC* when he said, at [46], that he could not "discern why, if and to the extent that it is appropriate in Convention proceedings for children to be made parties, the facility for some of them to act without a guardian has been blocked".

67. In *Ciccone,* having joined the child as a party, MacDonald J decided, at [70]-[73], to order a report from Cafcass. He explained his decision as follows:

> "70 An issue arose during the course of the hearing as to whether, in circumstances where a child is joined as a party to proceedings and represented by a solicitor who is also appointed his or her Guardian, it is necessary to have a report from Cafcass on the question of whether the child's objections are authentic, as opposed to the product of influence by the parent who has allegedly abducted the child, and the extent to which the objections coincide with, or at odds with the child's welfare. As I said during the course of giving my brief reasons on the evening on 23 December 2015, I would have liked to have had the opportunity to explore this issue in more depth during submissions. This was not possible due to the constraints of time.
>
> 71 Whilst the "gateway stage" of the child's objections defence is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in 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 his or her views, at the discretion stage the court must consider not only the nature and strength of the objections but a much wider range of considerations including whether they are authentic as opposed to the product of influence by the parent who has allegedly abducted the child and the extent to which the objections coincide with, or are at odds with the child's welfare (see *In re M (Children)(Abduction: Rights of Custody)* [2008] AC 1288; and *In re M (Children) (Abduction: Child's objections)* [2015] EWCA Civ 26); [2016] Fam 1.
>
> 72 Within this context, it does seem to me on the face of it (and without having heard detailed submissions on the point) that a solicitor who is representing an articulate and mature child joined to the proceedings, and who is bound to take and act on instructions from that child in advancing his or her case, might be placed in a difficult position if required by the court also to provide an evaluation of such issues as whether the objection their client instructs them to advance is authentic as opposed to the product of influence by the abducting parent or as to the

> extent to which the objections coincide with, or are at odds with their client's welfare. This is particularly so where, as in this case, the child instructs his or her solicitor that his decision is free from influence and consistent with his welfare.
>
> 73 In these circumstances, and whilst in no way seeking to lay down any general principle or rule, it seems to me that, notwithstanding that Rocco is represented by a solicitor who is also appointed as his Children's Guardian, the assessment of whether Rocco's objections are authentic as opposed to the product of influence by his father and the extent to which Rocco's objections coincide with, or are at odds with his welfare remains properly the task of a Cafcass officer."

Given the judge's reference to this decision, I would note that MacDonald J made clear that he was not seeking to establish any rule or general principle. He was doing no more than pointing to the difficulties which could occur if a solicitor provided "an evaluation of such issues", in part to explain his decision to order a Cafcass report on an issue which he considered "properly the task of a Cafcass officer". While I agree with both elements of these observations, MacDonald J was not dealing with the admissibility or the assessment of such evidence in the circumstances of the present case.

68. Finally in respect of the FPR 2010, we were told that the effect of the present structure has been that the "pragmatic approach" adopted by Baker J has become the conventional response with the appointment of the child's solicitor as guardian. I can see that this might well be the pragmatic solution but it raises significant questions as to whether the appointment of a guardian should be required by the FPR 2010 as well as the proper role of a solicitor-guardian in proceedings under the 1980 Convention.

69. There are clearly "difficulties" as referred to by MacDonald J. These issues need to be addressed but, in my view, they are better addressed through a committee rather than through a judgment from this court. That is why, as I will deal with in more detail in the other appeal, I would suggest that the President of the Family Division should consider setting up a committee with MacDonald J as chair to make recommendations as to (i) whether r.16.6(1) should be extended to apply to proceedings under the 1980 Convention; (ii) the appropriate role in such proceedings of a solicitor appointed also as a child's guardian; and (iii) any other recommendations as to the process which should be adopted in respect of a child being joined as a party to such proceedings. This is suggested wording only and is not intended to be prescriptive as to the matters which any such committee might consider it appropriate to address.

70. Although not directly challenged on behalf of the mother, as referred to above, I propose, briefly, to deal with the issue of the admissibility of opinion evidence given by a solicitor-guardian.

71. Section 3 of the Civil Evidence Act 1972 provides as follows:

> "3 Admissibility of expert opinion and certain expressions of non-expert opinion

> (1) Subject to any rules of court made in pursuance of . . . this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.
>
> (2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.
>
> (3) In this section "relevant matter" includes an issue in the proceedings in question."

This provision is extended to include the evidence of a witness who is not called by s.1 of the Civil Evidence Act 1995, which provides:

> "(1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay.
>
> (2) In this Act—
>
> (a) hearsay means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and
>
> (b) references to hearsay include hearsay of whatever degree."

Section 13 of the 1995 Act provides that a "statement" means "any representation of fact or opinion, however made". Accordingly, as set out in Phipson, at [29-03], this provision "covers statements of opinion admissible under the 1972 Act".

72. The position is dealt with in Phipson, at [33-112]:

> "Although in general inadmissible, the opinions or beliefs of witnesses who are not experts are admissible in proof of the matters mentioned below, on grounds of necessity, more direct and positive evidence being often unobtainable. Moreover, it has long been thought, and for civil cases it has now been declared by s.3(2) of the Civil Evidence Act 1972, that non-expert opinion may be received as evidence of the facts intended to be conveyed by that expression of opinion. Thus there is no blanket rule that a factual witness may not include opinion evidence in his witness statement in civil cases. There are numerous authorities which exemplify that a witness of fact may give opinion evidence which relates to the factual evidence he is giving, particularly if he has relevant experience or knowledge. An example is where the evidence given is to a hypothetical situation as to what would or could have happened. In *Rasool v West Midlands Passenger Transport Board* an account of a witness of a road accident was

> received notwithstanding the fact that it contained the words "the bus driver was in no way to blame for the accident". The court treated them as admissible although the 1972 Act did not fall to be considered, and the point was not argued.
>
> The statute purports to declare the law, and it is thought that the position must be the same in criminal cases. This proposition is given emphatic support by *R. v Johnson* where a witness testified that she had seen the victim of a rape and buggery of the defendant shortly after the incident and that although she had initially thought that the victim was play-acting, she had come to believe that her distress was genuine.
>
> In civil cases, hearsay evidence of opinion is admissible under s.1 of the Civil Evidence Act 1995 (which renders all hearsay, whether of fact or opinion admissible). This provision extends to admissible non expert opinion of the kind discussed here. In criminal cases, however, the change in law wrought by s.30 of the Criminal Justice Act 1988 is expressly confined to expert evidence. Hearsay evidence of the opinion of non-experts accordingly remains inadmissible."

73. Phipson refers to the first paragraph quoted above (as it appeared in the 17th Edition) as having been followed in *Lawrence v Kent County Council* [2012] EWCA Civ 493. In the judgment of the court (Longmore, Kitchin LJJ, Sir Mark Waller) given by Sir Mark Waller, he addressed the question of whether the trial judge had been right to decide that the views of two non-expert witnesses were irrelevant:

> "[23] It is trite law that opinions are the province of experts. It is furthermore trite law that even experts do not decide cases – judges decide with the help of experts. It is however very common certainly in civil cases for a factual witness to give evidence and in order to describe that on which they are giving that evidence express an opinion. This is recognised by s 3 of the Civil Evidence Act 1972 to which unfortunately Eady J's attention was not drawn. That section provides:
>
> …
>
> [24] In Phipson on Evidence 17th edition paras 33 – 88 under the heading "Opinions of non-experts" there appears the following:
>
> …
>
> [25] Furthermore time and again one sees references to the opinion of a factual witness in judgments in the authorities before us without any suggestion they are totally irrelevant. Thus in *Mills v Barnsley Metropolitan Borough Council* Steyn LJ refers to the unchallenged evidence of Mr Booth, the Council's Inspector, that if he had seen the missing corner of the brick he would not have regarded it as a problem and would have treated

> it as a minor defect . . . . While the judge was not bound to accept Mr Booth's view as to the relative importance of the defect, it is not clear what inference he drew . . . . In *Uren v Corporate Leisure (UK) Ltd and another* [2011] EWCA Civ 66, [2011] ICR D11 the Court of Appeal criticised the judge for thinking that "what spectators thought" about the dangerousness of a game was irrelevant and thought the judge was wrong to disregard the impressions of eye-witnesses. Perhaps the most striking case is that of *Dalton v Nottinghamshire County Council* [2011] EWCA Civ 776 where Tomlinson LJ, in dismissing an appeal without calling on the Respondents, approved the judge having placed great reliance on the view of the Council's surveyor that a protrusion was dangerous.
>
> [26] Of course the weight to be given to such evidence will depend on many things."

74. We were also referred to the Guidance published by the Family Justice Council in April 2022, Guidance on Assessing Child's Competence to Instruct a Solicitor, to *Re CS (A Child)* [2019] 1 WLR 4286 and to *A and B (Recission of Order: Change of Circumstances)* [2022] 1 FLR 1143. In the latter case, Cobb J recorded, without demur at [57], Mr Netto's "own assessment of the sibling relationship" which included that they "are incredibly close" and that he "had the sense that they were inseparable". This evidence clearly formed part of the evidence relied on by Cobb J when making his decision.

Determination

75. There is much in the judgment with which I agree, including in respect of the judge's analysis of some aspects of Mr Netto's evidence. I also see the force in Mr Gration's submission that the judge considered "how much weight could be given to the analysis of [D's] views offered by each professional" and was entitled to prefer the evidence of the Cafcass Officer. However, I have reluctantly come to the conclusion, in respect of the first ground of appeal, that the judge's assessment of the evidence was sufficiently undermined by his view, that Mr Netto should not have been giving opinion evidence and that such evidence was not admissible, as to render his decision unsustainable. As submitted by Mr Turner, the judge's assessment of the evidence and his decision to give "negligible" weight to Mr Netto's evidence are sufficiently "tainted" to undermine his substantive decision because they were significantly based on the judge's disapproval of Mr Netto giving opinion evidence including because he considered it inadmissible.

76. It was clearly unfortunate that the issue of the admissibility of parts of Mr Netto's evidence was introduced by the judge during the final hearing. In my view, this affected the fairness of the proceedings and the proper determination of the application.

77. No objection had been taken to the nature of Mr Netto's evidence prior to the hearing. Accordingly, this caught the parties by surprise and meant that they were not in a position properly to address it.

78. More substantively, I do not consider it possible to conclude, as submitted by Mr Gration, that the judge properly considered Mr Netto's evidence when making his

decision. I acknowledge that the judge said that his "task" was to assess the weight he could give to Mr Netto's evidence. However, as referred to above, his conclusion that the weight it could be given was "negligible" was significantly based on his conclusions as to "the legal status and appropriateness of this evidence", as the judge phrased the issue.

79. The judge concluded that Mr Netto had "been insufficiently attentive to the lines between opinion evidence and legal representation". The judge considered this "extremely unhelpful" and that as a matter of *principle* it was "almost impossible for the court to apportion weight to the evidence". This and other passages show that the judge brought issues of principle into his assessment of Mr Netto's evidence and did not simply consider it on its merits.

80. The judge's assessment was also clearly influenced by his conclusion that Mr Netto's opinion evidence was inadmissible. As set out above, in my view, this conclusion was wrong and was a conclusion which again reflected the manner in which this issue had been raised in that the judge clearly heard limited argument on the point.

81. I have carefully considered whether the judge's decision can nevertheless be upheld. There are clearly very powerful reasons why a return order should be made as identified by the judge. However, I have very reluctantly come to the conclusion that the matter must be reheard. This is principally because I do not consider that this court is properly and fairly able to re-make the decision and because I do not consider that the outcome of a return order can be described as inevitable or sufficiently inevitable so as not to justify a rehearing.

82. I do not consider that either of the other grounds of appeal have any substantive merit.

83. As to the second ground of appeal, a judge is entitled to give little weight to a *Gillick*-competent child's views if the judge concludes, as the judge did, that those "views have been and continue to be influenced by the inescapable pressure made by his F and the threat of separation". But for the matters referred to above, the judge would have been entitled to attach little weight to D's views.

84. I would just add the following. First, "authentic" is typically used when a child's views are *not* considered to be the product of or reflecting, in particular, the influence of the taking parent. Secondly, a child's, even a *Gillick*-competent child's, views are but one element to be taken into account when the court is exercising its discretion. I would reject the submission made in the child's written submissions, based on what Mostyn J said, in a different context, in *AS v CPW* when he expanded on, or disagreed with, what Lady Black had said in *Birmingham City Council v D (Equality and Human Rights Commission and others intervening)* [2019] 1 WLR 5403, at [90], by saying, at [22]:

> "… it is not merely a question of giving "due regard" to the wishes of a Gillick-competent child on a particular issue. In my judgment, if the decision of the House of Lords in *Gillick* is not to be hollowed out, the wishes of a *Gillick*-competent child on a particular issue, where they are not objectively foolish or unreasonable, should normally be given effect"."

Certainly in proceedings under the 1980 Convention, I would endorse what Lady Black said, albeit again in a very different context, namely that what is required is that "due regard" must be given to the wishes of a child.

85. Both of the above points are reflected in what Lady Hale said in *In re M and another (Children) (Abduction: Rights of Custody)* [2008] 1 AC 1288, at [46]:

> "In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."

86. As to the third ground of appeal, the judge did not unduly narrow his welfare assessment. He conducted a sufficiently broad analysis which took into account the pertinent factors.

87. Finally, there is much force in Mr Gration's submission that D should not have been joined as a party at the first hearing. This issue needs to be considered at the first hearing but, as Baker J said in *WF v FJ*, it is clearly preferable, and I would say advisable absent strong reasons to the contrary, for the child to be seen by the Cafcass High Court Team before any decision is taken as to party status.

Conclusion

88. It is, therefore, regrettably, necessary for the case to be remitted for a rehearing (before a Family Division Judge to be nominated by the President of the Family Division) subject, of course, to the parties not agreeing a welfare resolution in D's best interests. Subject to that, it will also be necessary for D to be seen by a Cafcass Officer, preferably Ms Cull-Fitzpatrick. The extent to which Mr Netto should be permitted to give further evidence will be a matter for the judge giving case management directions.

Lady Justice Elisabeth Laing:

89. I agree.

Lady Justice King:

90. I also agree.