THE COURT ORDERED that no one shall publish or reveal the name or address of the child who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the child or of any member of her family in connection with these proceedings.

30 October 2019

PRESS SUMMARY

In the matter of NY (A Child) [2019] UKSC 49
On appeal from [2019] EWCA Civ 1065

JUSTICES: Lord Wilson, Lord Hodge, Lady Black, Lord Kitchin, Lord Sales

BACKGROUND TO THE APPEAL

This appeal concerns a father's application for an order for the immediate return of his daughter from England and Wales to Israel. The issue raised is whether the Court of Appeal, having determined that such an order could not be granted under the Hague Convention on the Civil Aspects of International Child Abduction 1980 ('the Convention'), was nonetheless entitled to grant it under the inherent jurisdiction of the High Court to make orders in relation to children ('the inherent jurisdiction').

The child's parents are Israeli nationals who married in 2013. She is their only child and is now aged almost three. Her parents lived at first in Israel but moved to London in November 2018. There the marriage broke down. The father returned to Israel, but the mother refused to do so, and remained in London with the child. The father applied under the Convention, which is set out in Schedule 1 to the Child Abduction and Custody Act 1985 ('1985 Act'), for a summary order for the child's immediate return to Israel. The allegation underpinning his application was that, on 10 January 2019, when the marriage broke down, the mother had wrongfully retained the child in England.

The High Court granted the father's application. On appeal, the Court of Appeal ruled that it had not been open to the judge to make an order under the Convention and set his order aside. It held that there had been no grounds for concluding that the mother's retention of the child in England had been wrongful, and so the Convention had not been engaged. However, it then referred to passing observations made by the High Court judge to the effect that, if he had found that the child had been habitually resident in England, he would have reached the same decision to order the child's immediate return under the inherent jurisdiction as he had under the Convention. Relying on those observations, the Court of Appeal made a summary order for the child's return under the inherent jurisdiction. The mother appealed to the Supreme Court.

JUDGMENT

On 14 August 2019, the Supreme Court unanimously allowed the appeal and set aside the Court of Appeal's order. Owing to the urgency of the decision, a judgment giving reasons was not issued at that time. Lord Wilson now gives the unanimous judgment of the court setting out its reasons.

REASONS FOR THE JUDGMENT

The appeal raises two questions. First, was the inherent jurisdiction available to the Court of Appeal in principle? Second, if so, was the exercise of it flawed? The answer to both questions is "yes" **[2-3]**.

Inherent Jurisdiction Available

The mother argued that the inherent jurisdiction had not been available to the Court of Appeal on the grounds that a summary order (i.e. an order made without a full, conventional, investigation) for the child's return outside the Convention could only have been made as a 'specific issue order' under the Children Act 1989 ('the 1989 Act') **[26]**. A specific issue order is an order made to decide a question connected with any aspect of parental responsibility for a child: had it been appropriate on the facts to make such an order here, it would have been open to the Court of Appeal to do so **[27-28]**.

Before the introduction by the 1989 Act of specific issue orders, summary orders for the return of a child abroad could be made under the inherent jurisdiction **[29-30]**. Such orders continued to exist alongside orders under the Convention after it was introduced into domestic law by the 1985 Act, since differences between the inherent jurisdiction and the Convention mean that an order for a child's return may, in some circumstances, be required under the former, but not the latter, legal framework **[31]**. But did the 1989 Act do away with the inherent jurisdiction to order a child's return **[32]**?

The mother argued that para 1.1 of Practice Direction 12D, supplementing the Family Procedure Rules 2010, showed that the 1989 Act did have that effect: for it instructs that the inherent jurisdiction should only be invoked where the issues 'cannot be resolved under the 1989 Act' **[33-36]**. However, practice directions have no legal authority to the extent that they state the law incorrectly **[37-38]**. There is no statutory basis for the instruction in para 1.1, and the case-law indicates that an order can be made under the inherent jurisdiction even where a specific issue order would also have been available **[39-43]**. Therefore the instruction in para 1.1 goes too far. However, if an order is available by both routes and a party chooses to invoke the inherent jurisdiction, the judge will need to be persuaded early in the proceedings that that choice was reasonable **[44]**. Nor does the court accept the mother's argument that an application for a summary specific issue order requires a different inquiry from an analogous application under the inherent jurisdiction. The same approach is required under both frameworks, as both are based on the principle that the child's welfare is paramount **[45-50]**.

Exercise of Inherent Jurisdiction Flawed

The Court of Appeal did not inquire into whether the child's welfare required a summary order for her return, as it considered that the High Court had made that determination and had not erred in doing so **[51]**. Yet the judge had not made a determination under the inherent jurisdiction **[52]**. Nor could his determination under the Convention stand as one under the inherent jurisdiction: for the Convention, unlike the inherent jurisdiction, is not based on the paramountcy of the child's welfare **[53]**.

The fact that the father had not invoked the inherent jurisdiction did not prevent the Court of Appeal from making an order under it. But it did place a duty on the Court of Appeal to ask whether the mother had had sufficient notice of its intention to use the inherent jurisdiction to allow her to seek to oppose it **[54]**. The Court of Appeal should also have considered eight further questions before making its order under the inherent jurisdiction, including whether the evidence before it was sufficiently up to date, and whether the High Court judge had made findings sufficient to justify the order **[55-63]**. Its failure to consider any of these questions is what led the Supreme Court to uphold the appeal **[64]**.

References in square brackets are to paragraphs in the judgment