Neutral Citation Number: [2014] EWCA Civ 1557

Case No: B4/2014/3136

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Family Division of the High Court of Justice
Hogg J
ZC14P00148

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2014

Before:

LORD JUSTICE TOMLINSON
LORD JUSTICE RYDER
and
LADY JUSTICE KING

- -

In the Matter of S (A Child) (Abduction: Hearing the Child)

Between:

AM	**Appellant**
- and -	
AS	**Respondent**

- -
- -

Mr Henry Setright QC and Mr Michael Gration (neither of whom appeared below) (instructed by **Dawson Cornwell**) for the **Appellant**
Mr Teertha Gupta QC and Ms Francesca Dowse (instructed by **Withers LLP**) for the **Respondent**

Hearing date: 30 October 2014

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Approved Judgment

Lord Justice Ryder:

1. A is a seven year old girl whose parents are nationals of the Russian Federation. They were married in 2006, separated in 2009 and divorced in 2010. On 11 September 2014 on the application of A's father, Hogg J made an order in the inherent jurisdiction of the High Court for the summary return of A to Russia. The order was opposed by A's mother. This is the mother's appeal against that order.

2. At the conclusion of the hearing on 30 October 2014 the court allowed the appeal, set aside the order and remitted the application to be determined by another judge of the Family Division of the High Court who is available to give directions and hear the application before the end of December this year. These are my reasons for concurring in that decision.

3. The background circumstances are these. A was born in this jurisdiction as the result of a decision by her parents to come here for medical treatment. The family returned to Russia shortly after A's birth. The parties' subsequent separation has not been easy and the Moscow court is seized of cross applications for residence. At present those proceedings are 'suspended' pending a psychological assessment of the child and of the parents. Both parents are engaged in that process and both were represented by lawyers at a hearing on 29 August 2014 when that case management step was directed.

4. Approximately three years ago A's mother formed a new relationship with a man, Mr B, with whom she subsequently lived in Moscow together with A. Mr B is a political activist. His flat was raided by the authorities in March 2014 and there had been what were described to the judge as 'previous difficulties' because the authorities there were not happy with his activities. On 26 April 2014 he came to the United Kingdom where he has remained. On 23 May 2014 criminal charges were laid against him in Russia which he says are politically motivated. Mr B claimed asylum on 25 July 2014 and a decision of the Secretary of State is awaited on that claim.

5. On 28 April 2014, that is two days after Mr B arrived, A and her mother arrived in the United Kingdom. The reason for the visit was said to be because mother was pregnant with Mr B's child. Mr B and mother had decided to go to the obstetrician in London who had been consulted regarding A's birth. A baby boy was born on 18 May 2014 in London. Mother's evidence to the court was consistent in stating that it was always her intention to return after the birth to Moscow where she wanted to continue to live. The return flight was booked for 20 May 2014. She did not return on that day and remains with Mr B and the children in London.

6. Mother has not made an application for asylum for herself or for the children. That is apparently because she is advised that she and the children will be regarded as dependents of Mr B if he is granted asylum. Mother is also advised that in order to be regarded as dependents she and the children have to be in this jurisdiction when Mr B's asylum status is granted.

7. Within the proceedings relating to A in Moscow an agreement was entered into in February 2014, between A's mother and father, that A would live with her mother and have significant staying contact with her father every week and during her holidays. This court has not been told about the status of that agreement and how it is affected

by the continuing litigation in Moscow, but it is clear that A's father was playing a significant part in her life and in decisions about her, for example, including her education, prior to her mother's unilateral removal to this jurisdiction.

8. On 23 May 2014 mother applied to the court without notice to the father for an order under the Children Act 1989 that A's father should not remove A from her care or from the school she was attending in this jurisdiction. That order was renewed, again without notice, on 29 May 2014. Given that it appears that mother and Mr B were communicating with father by email during the relevant period and that no asylum claim had then been made, I am unsure why anyone thought it appropriate to exercise jurisdiction without examining habitual residence and I am even less clear why it was thought to be proper to make orders without notice to A's father.

9. In any event, A's father became aware of the orders on 23 June 2014. On 20 August 2014 he made an application to the High Court for the return of A to Russia. Directions were heard on two occasions in August 2014, no doubt by a judge sitting in the urgent applications list and the application was determined by Hogg J on 11 September 2014. A's parents were represented by leading counsel. A new legal team has been instructed to represent mother before this court. The application was dealt with on submissions and the written evidence that had been filed. No-one applied for oral evidence to be heard. The court made an order for A's return.

10. The key issue in the appeal, which was identified when permission was given by the single judge, is that no consideration was given by the court to the wishes and feelings of A and to the welfare of the child from her perspective. There is a subsidiary ground relating to the rejection by the court of mother's evidence concerning the effect of separation on the child as a consequence of return.

11. I emphasise that given the decision of this court, welfare is to be re-considered by another judge in the very near future. Nothing in this judgment should be taken to be an indication, one way or the other, of any aspect of that determination. I also make it clear that the judge who heard the application did so under the misapprehension that the issue underlying the appeal had been considered and resolved at the earlier directions hearings. She dealt with the case as an urgent matter in the vacation and gave an *ex tempore* judgment that is not criticised. It is very unfortunate that the issue that gave rise to the error that occurred was not identified until the appeal was entered.

The Principle

12. Proceedings concerning the welfare of a child whether in the Family Court or in the reserved jurisdictions of the High Court are subject to the same fundamental principles concerning effective access to justice for children who are the subjects of the applications that are made. There is no general rule in England and Wales that every child should be a party and that every child be represented by lawyers, by litigation friends or by welfare guardians. In each species of jurisdiction there are rules and practice directions that require or permit different forms of representation depending on the nature of the process and the facts of the case. There is often a delicate balance to be undertaken between the procedural protections that are afforded to a child by the process and the protection that may be necessary in respect of the impact on the child of the process (including the adversarial positions of the child's parents).

13. The underlying concept is that the child must be afforded effective access to justice so that the State does not infringe that child's article 6 and 8 ECHR rights. Without prejudice to the schemes that are in place for public and private law children applications under the Children Act1989, this case is about the application of the general principles to proceedings in the inherent jurisdiction of the High Court. It should be recollected that in this case A was made a ward of court and was accordingly subject to the prerogative jurisdiction of the Crown otherwise known as the *parens patriae* jurisdiction, which is administered by the judges of the High Court.

14. There is a dispute between the parties about whether there are general principles that apply in a case of this kind. If there are, the key question that arises is whether the application of those general principles required something to be done that was not done on the facts of this case.

15. Article 12 of the United Nations Convention on the Rights of the Child 1989 [UNCRC] provides that:

> "[1] States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> [2] For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

16. The UNCRC creates international obligations rather than domestic rights. That said, it is consistent with and has a persuasive interpretative effect on other international instruments that are binding on the United Kingdom. For example, article 24 of the Charter of Fundamental Rights of the European Union provides that:

> "[1] Children shall have the right to such protection and care as is necessary for their well being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
>
> [2] In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

17. Likewise, article 11(2) of Council Regulation (EC) No. 2201/2003 (Brussels II Revised or B2R) requires the requested court of a member state to ascertain a child's wishes and feelings when considering any application for return:

> "[2] 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."

18. Article 11(2) B2R only applies to cases concerning two EU member states. Its significance and application to Hague Convention cases was settled by the opinion of Baroness Hale of Richmond in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619:

> "[58] …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 Art 12 of the United Nations Convention on the Rights of the Child 1989. It applies, not only when a 'defence' under art 13 has been raised, but also in any case in which the court is being asked to apply Art 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."

19. An example of the seriousness with which this issue is to be taken when B2R is engaged can be found in the subsequent decision of this court in *Re F (Abduction: Child's Wishes)* [2007] EWCA Civ 468, [2007] 2 FLR 697. In a case in which the mother's statement of defence asserted that the child's views should be heard in accordance with art 11(2) B2R but where that protection was omitted by the parties and the court, Thorpe LJ held that the failure to hear the child by ascertaining her wishes and feelings amounted to a fundamental failing:

> "[16] …What enables me to characterise this case as unusual, indeed exceptional, is that at all stages after the filing of the mother's defence of 15 January 2007, no-one, either practitioners or judges, focussed on the final paragraph of her defence. Accordingly, there was no enquiry as o J's wishes and feelings, which is the ordinary interpretation of the court's obligation to 'hear the child'. It was not a case in which the child's wishes and feelings had been projected into the centre of the stage by a reliance on the child's objection to return. But a clear distinction has to be drawn between obligations that flow from a pleading of the child's objections and the court's

> obligation, quite apart from anything that may be pleaded, in all cases to hear the child, unless that necessity is excused by reference to the child's age and understanding.
>
> [17] The obligation of the court, as the defence rightly pleaded, arises from Art 11(2) of the Brussels II Revised regulation. Mr Setright QC, who did not appear below, has presented the mother's appeal with his characteristic skill and experience. He says: well, the judge is not really to be blamed because nobody directed her attention to the need to hear J, the mother never suggested it, the father never suggested it. Mr Setright reminds us that it can be something of a dangerous development in a Hague Convention case since the child, when heard, may easily negate a defence that has been raised or developed by an abductor. So, it might be said that this was a strategic decision on the part of each of the parties: but the court is not concerned and certainly not rules by the litigation strategy of either of the parties. It has an obligation, imposed by Art 11(2) of Brussels II Revised, to hear the child, whatever may be the consequences. So, naturally, Mr Setright submits that the judge unwittingly fell into a fundamental error and, accordingly, the case must be remitted to her to enable her to discharge her obligations under the Regulation."

20. In the same case, Thorpe LJ ventured an *obiter* opinion that predicts the submission made in this case:

> "[25] […] Practice developments should perhaps not be limited to European cases brought under the Regulation, given the observations of Baroness Hale of Richmond in the course of her speech in *Re D*. Plainly, it may be prudent for that question to be raised equally in what I would call global abduction cases."

21. Thorpe LJ had earlier considered the impact of delay and the obligation to hear European cases within six weeks of issue. As respects cases where art 11(2) B2R is engaged, he said:

> "[24] One thing that is clear to me is that the obligation to hear the child must not override the obligation in the same Art 11 to conclude the proceedings within 6 weeks of issue. It must be implicit in the juxtaposition of the two obligations that the obligation to hear the child will be fulfilled within the 6-week duration of the litigation, particularly since in the majority of Member States the judge hears a child directly at the final hearing. But to ensure that there is no repetition of the unfortunate development in the present case, it seems to me to be necessary that in the future the question of how and when the court will hear the child, in discharge of its obligations under Art 11(2), must be considered at the first directions appointment and any subsequent directions appointment to

> ensure that the central ingredient of the case is never out of the spotlight."

22. The appellant mother submits that having regard to these statements of high principle, it must follow that in the exercise of the inherent jurisdiction relating to the abduction or retention of a child where neither the Hague Convention nor B2R apply, the same principle of effective access to justice for a child is engaged and the court should consider how a child is to be heard. In support of that submission she relies upon four matters that are at least firmly suggestive that no less strong an application of that principle can apply in the exercise of the inherent jurisdiction:

    i) While a child's best interests are a 'primary consideration' within Hague Convention proceedings (see *E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 at [18]), they are the paramount consideration when considering an application for return in the exercise of the inherent jurisdiction (see *J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80 at [22] to [25]).

    ii) The requirement to hear the child must logically apply with no less force in proceedings where there is no Convention policy of return i.e. there is in the inherent jurisdiction an unfettered perspective on welfare with only a limited presumptive starting point in favour of return (see *Re J* at [31]).

    iii) In determining an application for return in the inherent jurisdiction, the court must focus on "the individual child in the particular circumstances of the case" (see *Re J* at [29]). It is a commonplace that in the exercise of the inherent jurisdiction a focus on the individual child and his or her circumstances will include a consideration of the child's wishes and feelings as an element of that child's welfare. It is good practice for evidence to be obtained by a report provided by a Cafcass practitioner or other expert, whether or not the child is joined to the proceedings as a party.

    iv) The good practice applicable in the exercise of the inherent jurisdiction in wardship has been translated in analogous circumstances into a statutory checklist of factors in section 1(3) of the Children Act 1989. That checklist includes at section 1(3)(a) "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)". The checklist does not apply to these proceedings but can be taken to be determinative of good practice in this jurisdiction and how the principle of effective access to justice for the child is to be ensured.

23. Given the force of these submissions, is there any contrary submission on the point of principle? The Respondent father submits that it is an error of principle to import Hague Convention or European principles into a non-Hague inherent jurisdiction case and that the identification and balancing of relevant welfare factors is a discretionary exercise which should not be interfered with by this court. Furthermore, it is submitted that to require the hearing of a child in every case would be wrong and would lead to delay that on the facts of individual cases would be inimical to the welfare of the child. He cites alternative extracts from the opinion of Baroness Hale in *Re J* (supra) to the effect that Hague principles should not be extended to cases in which non-Hague countries are involved:

> "[12] If there is indeed a discretion in which various factors are relevant, the evaluation and balancing of those factors is also a matter for the trial judge […]. Too ready an interference by the appellate court […] risks robbing the trial judge of the discretion entitled to him by the law […].
>
> [18] […] any court which is determining any question with respect to the upbringing of a child has had a statutory duty to regard the welfare of the child as its paramount consideration […].
>
> [22] There is no warrant, either in statute or authority, for the principles of the Hague Convention to be extended to countries which are not parties to it. […]
>
> [25] Hence, in all non-Convention cases, the courts have consistently held that they must act in accordance with the welfare of the individual child. […] Hague Convention principles are not to be applied in a non-Convention case. […]
>
> [26] […] the court does have the power, in accordance with the welfare principle, to order an immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits. […]
>
> [28] It is plain, therefore, that there is always a choice to be made. Summary return should not be the automatic reaction to any and every unauthorised taking or keeping a child from his home country. On the other hand, summary return may very well be in the best interests of the individual child.
>
> [32] The most one can say, in my view, is that the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. […]"

24. With respect to the careful and attractive argument advanced by Mr Gupta QC for the father, there is nothing in this submission that detracts from Mr Setright QC's powerful argument on the point of principle. The question of what if anything of that which a child wants to say is relevant to welfare and the weight to be given to it is an entirely separate question from the principle that a child is to be heard. The adverse welfare effect of delay may influence or even determine whether and how a child is to be heard on the facts of a particular case, but that again is a question relating to the welfare balance on a case management issue, not the question of principle. That fact, if it arises, is likely to be met by early directions relating to how a child is to be heard as suggested by Thorpe LJ in *Re F* (supra).

25. The point that receives critical emphasis in *Re J* is not whether a child should be heard but whether, absent a defence, the Convention principle of adjudication in the state where the child has his or her habitual residence is to have the same effect in the inherent jurisdiction as it must in Hague proceedings. It does not, but that is not the

question in this appeal. The B2R imperative of time limited proceedings, like Hague Convention policy, is not to be imported into the inherent jurisdiction to the detriment of welfare, which is the paramount consideration. Likewise, the policies that are relevant to Hague and European abduction cases are not to be imported into the inherent jurisdiction to the exclusion of the obligation to hear the child which is both an integral part of the welfare evaluation and the guarantee of the child's effective access to justice.

26. Mr Gupta prays in aid extra judicial commentary by Sir Nicholas Wilson (as he then was) in the Hershman/Levy memorial lecture given on 28 June 2007 and published as 'The ears of the child in Family Proceedings' September [2007] Fam Law 808. Sir Nicholas argued that to collect the views of children in Hague Convention cases, where in certain circumstances the Convention does not permit any significant consideration by the court of the child's views, would mislead the children concerned in to thinking that their views will have a bearing on issues that the Convention precludes. He was concerned about the broad nature of the obligation imposed by art 11(2) B2R in that context and expressed the opinion:

> "[that] it is the indiscriminate emphasis on the voice of the children even in which the law affords it no real place which offends me. Let our necessary development of children's procedural rights in family proceedings be guided by logic and reason; not propelled by some mantra, thought no doubt to reflect the *zeitgeist* of children's increasing autonomy, which misleads children into believing that their views are relevant when they are irrelevant and which draws resources of CAFCASS away from situations in which there is a real need for improvement in the quality of the service which it provides to children in family proceedings."

27. In deference to Sir Nicholas, I shall answer the implied question posed by Mr Gupta. Of the mischief adverted to, one aspect was the effect of the terms of the Convention and Convention policy on the legal issues to which evidence can properly go. Another was the adverse effect on children of their unnecessary involvement in the adversarial disputes of their parents. Both of these are questions of very great importance generally and to the discretionary decision to be made in every case but they do not meet the question of principle in this case, which is neither a reflection of fashionable attitudes nor a question constrained by the terms or policy of the Hague Convention. In this case, it is the welfare of the child that governs both the procedural and substantive questions. It cannot seriously be argued that where a child is of an age and understanding to be heard, that the child's voice is of itself irrelevant to welfare or that it can be assumed that the child's parents will be an appropriate vehicle to articulate the child's voice or to provide effective access to justice for the child.

28. On the question of principle, therefore, I agree with the appellant's submissions i.e. for the reasons set out above, there is an obligation in principle on the High Court sitting in its inherent jurisdiction in relation to an abduction application to consider whether and how to hear the child concerned.

Application of the principle

29. Turning then to the application of principle on the facts of this case. Regrettably, no-one raised questions about the child's age and understanding or whether and how her voice was to be heard at the directions hearings prior to the determination by Hogg J. During the hearing which led to the order for summary return counsel for the child's father, in opening the application, addressed the question of welfare from the child's perspective in this way:

> "So, again, looking at it from the child's perspective, because, of course, there is no Cafcass report – we would respectfully submit that time did not allow for it, and also this child is of a young age – what could she say in the circumstances? We would respectfully submit that that obviously was thought through at previous hearings and not needed for these summary proceedings, the way it is sometimes needed for other children who are a bit older. This child would have thought, no doubt, "I am going back in due course."

30. It was right to draw the attention of the court to the need to consider the child's perspective. Inferentially that was a nod in the direction of the principle I have explained. It was also right to consider the effect of delay and the question whether this particular child was of an age and understanding to be heard and if so, the mechanism for that. Whether the child would have anything to say that would be of relevance was speculation but not an inappropriate question given the potentially adverse effect on a child of involvement even at arms length in litigation. Unfortunately, and I do not attribute blame for this, the questions which the court should have answered fell away and remained unanswered because of the assumption that they had been considered and determined at the earlier directions hearings.

31. It is now common ground that there was never any consideration by a court of whether the child should be heard and if anyone knew that when the issue was raised before Hogg J they did not interrupt to correct the position or inform the court. That only leaves the suggestion that the child in this case was too young to be heard. I make no comment on whether she is of an age and understanding to be heard. That is a question of fact that is yet to be decided. Her age alone would not have suggested she lacked the autonomy to have a perspective on her welfare or whether she should have access to a court making a determination about her. She was seven years of age. That is a similar age to that of a number of children who have recently been heard as the consequence of the decisions of this court and the Supreme Court.

32. That is probably sufficient to dispose of this appeal but it is perhaps important to record the welfare submissions that this court has heard as they will no doubt be renewed at the re-hearing. Furthermore, the respondent father submits that even taken at its highest, anything the child could have said would not have made a difference to the order that the judge made. It is accordingly necessary to analyse the *prima facie* cases to justify the conclusion about the order to which this court came.

33. The child's father has the benefit of pre-existing proceedings in Moscow, an established and meaningful relationship with his child and her retention in a foreign jurisdiction to which he did not consent and with which he does not agree. He says

that if the mother will not or cannot return with their child, then he is able to accompany A and care for her subject only in the latter case to the determination of the Moscow court or in the alternative he will abide by the agreements to which the parents have already come in that jurisdiction.

34. So far as issues concerning the welfare of the child that might touch on the question of whether she should be heard, the following submissions were made:

i) There was no suggestion in the court below that mother might separate from A;

ii) Mother would have returned to Russia with the children had it not been for Mr B's asylum claim (presumably an implied or express acceptance that it was in A's interests to return absent that factor);

iii) Mother's case was that she would return to Russia, if ordered to do so, with both children, accordingly, on any basis A faces a fractured family life;

iv) The importance of the relationship between A and Mr B should not be elevated above that between A and her father;

v) No application for asylum is made by mother or on behalf of the children;

vi) Given that the mother's case is based on the complexities of Mr B's asylum claim, A would have nothing to contribute to that question;

vii) In any event, A's views are now likely to be those of her mother and Mr B;

viii) A's position will be canvassed in the Moscow proceedings, not least through the expert's report that has been commissioned;

ix) Mother has placed A at risk of emotional harm by the unilateral action that she took: she should not be allowed to take advantage of that act when it was never in the interests of A and she should not now be entitled to rely on the detriment to A that she has created by that act.

35. In summary, in the context of the parents' cases, it was submitted that there is nothing upon which the decision will turn that suggests that in this case it is necessary to hear from A or that hearing from her would make a difference to the decision.

36. The child's mother now has a child by Mr B. She faces the unenviable choice of returning to Moscow without Mr B and possibly without her new child or of remaining here while A returns. She has always had the primary care of A and Mr B has been a significant adult in A's life during the last three years. The new baby is undoubtedly significant to A.

37. In like manner, the following submissions were made on behalf of A's mother that touch on the question of whether she should be heard:

i) Mother still has a choice to make that will have a significant impact on her relationship with A: either by not returning to Moscow with A or by returning

without Mr B (and/or her new baby) with the significant impact that will have on her care of A;

ii) A will be deprived of the care of her mother and/or Mr B and possibly also of the company of her new step sibling;

iii) Given the immigration position of mother and A, and the inter-relationship between that and Mr B's asylum claim, it is the mother's case that she may not be able to return to Moscow;

iv) Given the travel ban obtained by father in Moscow, neither mother nor A may be able to leave Moscow to see Mr B should they return and if A returns to Moscow without her mother, the effect of the ban may prevent mother ever having contact with her;

v) Putting the child's position at the forefront of the decision making process ensures that that position and the child's welfare is not lost behind the adversarial positions of the parents;

vi) The case demanded an evaluation of A's welfare not just an evaluation of the parental positions;

vii) Within the Moscow agreement of February 2014 A was given the autonomy to decide how to spend her holiday time;

viii) Mother's evidence was that A did not want to go to Moscow over the summer of this year;

ix) Annexed to father's evidence was an email from mother setting out A's wishes and feelings which included a fear that father would not return her to mother after the summer vacation and that she did not want to go to father for contact after their last meeting because father had told mother in the child's presence that he would 'by all means ensure that [he would] take her from me, so that she would live with you'.

38. In summary, it was submitted that A has been used to expressing her own views about the arrangements that are made for her and has been placed in a position where she has felt it necessary to do so. It is now more necessary than ever before that the court knows whether A has anything relevant upon which she wishes to express a view. It is wrong for the court not to be appraised of those views other than through her parents. The impact on A of the decision that the court has to make and of the options for A that the decision comprises which include separation from her mother and/or her step father and step sibling, raises an imperative that the child be heard.

39. The father's case is powerful. It persuaded Hogg J on the papers and after hearing oral submissions. The impact on A and hence on her welfare of the options available to the judge demanded the classic balance sheet approach of evaluating the welfare factors intrinsic in each option and the benefits and detriments of the same. That approach should include an analysis of the child's wishes and feelings. Given the matters upon which the child has already expressed a view within the Moscow proceedings and the issues upon which her wishes and feelings might be relevant,

there is at least a *prima facie* case for a judge to consider whether and if so how A should be heard.

40. An element of the case is missing and that cannot simply be discounted because of the strength of father's case. It may significantly alter a judge's perception of welfare. Given that there has as yet been no consideration of whether the child should be heard, I have come to the regrettable conclusion that the order must be set aside to allow that process to be undertaken and for the decision to be reconsidered. I would allow the appeal, set aside the return order and remit the matter for directions and hearing before a different judge of the Family Division of the High Court as soon as possible.

Lady Justice King:

41. I agree.

Lord Justice Tomlinson:

42. I also agree.