Neutral Citation Number: [2015] EWCA Civ 1022

Case No: B4/2015/ 2485 & 2666

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION
HIS HONOUR JUDGE BELLAMY
FD15P00183

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2015

Before :

LORD JUSTICE MOORE-BICK
Vice President of the Court of Appeal Civil Division
LORD JUSTICE RICHARDS
and
LADY JUSTICE BLACK

- -

RE F (CHILD'S OBJECTIONS)
Note: was called Re N on appeal

Mr Nicholas Anderson (instructed by **Foort Tayler Solicitors**) for the **Appellant**
Mr David Williams QC & Miss Jacqueline Renton (instructed by **Goodman Ray Solicitors**) for the **Respondent**
Miss Mehvish Chaudhry (instructed by **Dawson Cornwell)** for the **children's litigation friend**

Hearing dates : 18th September 2015

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Approved Judgment

LADY JUSTICE BLACK:

1. This appeal is from the decision of His Honour Judge Bellamy, sitting as a High Court judge, on 2 July 2015. The judge made an order under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") for the return of four children to Australia. The application for a return order was made by the children's mother, the respondent being their father, with whom they are presently living in England, having been wrongfully retained here following a holiday over Christmas and New Year 2014/15.

2. The children are Simon (aged 13), Clare and Peter (twins aged 10), and Harry (aged 9). They were not parties to the proceedings below but were given permission to appeal out of time against Judge Bellamy's order by this court on 13 August 2015. Their appeal was listed together with their father's appeal against Judge Bellamy's order, for which permission had been given by McFarlane LJ on 30 July 2015. The respondent to both appeals is the children's mother.

3. The central issue in the appeal is the judge's treatment of the views of the children and, in particular, whether he should have treated those views as objections for the purposes of Article 13 of the Convention and, in the exercise of his resulting discretion, refused to order the children's return. At first instance, there was an issue also as to whether the mother had acquiesced in the wrongful retention of the children. There is no appeal against Judge Bellamy's determination that she had not.

4. Judge Bellamy's judgment can be found on bailii, reported as *Re F (Abduction: Acquiescence: Child's Objections)* [2015] EWHC 2045 (Fam). In it, he changed the children's first names in order to protect their anonymity and, purely in order not to confuse the issue, I have used the same names as he used.

The facts

5. There is a considerable amount of debate between the parties over the facts, much of which it is not possible (or necessary) to resolve at this stage in the proceedings between them. In the remainder of this section of my judgment, I will try to find the common ground, indicating the existence of a disagreement where that is not possible. I intend to deal separately with the evidence about the children's views, given that they are of central importance to the appeal.

6. The parents are both British and were living in this country at the time when the children were born. In 2007, the family emigrated to Australia. Within a matter of months, the parents separated. The mother remained in Australia in the former matrimonial home with the children. The father returned to England. He had formed a relationship with another woman who is still his partner; they now have a baby of their own, to whom the judge referred as Molly. Although based in England, the father also rented a property in Australia near to the family home and maintained contact with the children by visiting them in Australia several times a year. There is no doubt that, nevertheless, the children missed him.

7. The children made their first trip back to England in January 2014. They spent three weeks staying with the father. Upon their return to Australia, Clare said that

she wanted to live in England. The mother said to her that they would think about it again in six months time. On the mother's case, things settled down again; on the father's case, the children continued to say that they wanted to come to live in England but were told by the mother that it was not going to happen.

8. In view of the children's wish to see more of their father, it was agreed that they would spend the whole of the Christmas holiday 2014/15 in England with him. The mother and the children flew to England on 19 November 2014, the mother accompanying them so that she could see her grandmother who was ill. The mother went back to Australia after a few days and flights had been booked for the children to return on 23 January 2015.

9. The children did not return as planned. In response to the mother's resulting Hague Convention application, the father conceded that there had been a wrongful retention of them on his part, but he sought to rely upon the mother's acquiescence and/or upon the child's objections exception.

10. The father's case was that over the Christmas period, the children "became absolutely insistent that they would not return to Australia" and as the date for their departure drew nearer, they were all "adamant that they would not return to Australia and they all told [the mother] this directly". His version of events was that when the mother finally realised how determined the children were, she agreed to pack the house up and return to live in the UK, telling them that wherever they were, she would wish to be. The mother's case was that when the father told her on 11 January 2015 that the children would not be returning to Australia, she did not accept this and that that never changed.

11. In order to determine whether the mother had acquiesced, as the father asserted, Judge Bellamy had to reach conclusions about her position in relation to the return of the children to Australia. He found that she had not acquiesced in the father's wrongful retention of the children here. The reasoning behind that decision is set out in paragraphs 87 to 98 of the judgment.

12. The judge found that it was clear that the mother wanted the children back in Australia and that the father knew that (paragraph 98). He was in no doubt that "there was - and still is - a very significant power imbalance in the relationship between these parents" (paragraph 90). That assessment was based upon the difference in the parents' financial positions.

13. The parties are not agreed as to the father's precise financial circumstances but he appears to be able to live a comfortable lifestyle, paying for private schooling and also taking the children on a ski-ing holiday to Switzerland immediately after last Christmas and subsequently on holiday to Dubai. Judge Bellamy considered that the clear picture that emerged was that the father was "a man of financial substance" (paragraph 90).

14. In contrast, since the children were born, the mother has been financially dependent on the father, apart from her Australian state parent pension, and, in recent times, her income from a part time job, in total 600 AU$ per week. In February 2014, the father ceased making the mortgage repayments on the former matrimonial home. On his case, this was because he was struggling to keep them

up, and the mother was living with a new partner and should have been contributing, although Judge Bellamy said that there was no evidence to support the father's belief that the mother was cohabiting. The father said that he resumed mortgage payments in September and October 2014 but it is apparent that there were significant arrears. Upon her return to Australia, the mother was served with an eviction notice, which was followed by the repossession of the family home in February 2015. She also found herself unable to draw upon the parties' joint bank account.

15. The mother was left with nowhere to live and not enough income to support herself. She sold some of the furniture, put other items into containers for shipping, and had the family dogs accommodated in anticipation of them being sent to England (see paragraph 19 of Judge Bellamy's judgment). On 14 February, the day after she was evicted from the family home, she returned to England where her parents live and has been staying with them ever since. The Australian house has since been sold.

16. Judge Bellamy found that the mother's financial dependence on the father was an irritation to him but also a means by which he could exercise control over the mother (paragraph 91). At paragraph 92, he found as follows:

> "I am satisfied that by abusing the financial power imbalance in the way that he did the father effectively deprived the mother of the capacity to make a free and deliberate choice to return to England. On the contrary, his actions made such a return inevitable. The text message exchanges to which I referred earlier, when taken in the round, do not paint a picture of a mother who has acquiesced in the retention of her children in England or of a free and considered choice by her to return to live in England. They demonstrate that, in reality, she had little, if any, choice."

The text messages to which the judge refers must be those with which he deals at paragraph 16 et seq of the judgment (and see also paragraph 93). The judge said, at paragraph 17, that the totality of the text exchanges suggested that the father was putting the mother under intense pressure to bend to his will and described some of his texts as "highly abusive".

<u>The position with regard to the children</u>

17. Since they arrived in November 2014, the children have been based in the home that the father shares with his partner and their baby. For the most part, they have had a significant amount of contact with the mother although there have been difficulties at times. The extended family on both sides live in England and the children have enjoyed meeting and spending time with them, as well as being involved in the life of their baby half-sister. They are all now attending school, the arrangements having been made by the father without any consultation with the mother. The three youngest have been attending the local school since quite soon after they were retained here and are said to be happy and thriving. Simon has had

home tuition until this month, but has now started the new school year at a private school.

18. The judge had available to him information about the children's views from a number of sources. There was the parents' evidence as to what the children had said to them and as to their own views about the children's wishes. There were letters which Clare and Harry had written to the mother, which had been produced by the father in evidence. Clare had also written directly to the judge. There was evidence from the CAFCASS officer who had met the children individually on 20 May 2015. In addition, there was material from a meeting which took place between the judge and the children, at the instigation of the judge, on 30 June 2015, which was after the conclusion of the hearing but before the judgment was finalised.

The children's letters

19. The letters which Clare and Harry wrote to the mother read as follows (with a handful of insignificant spelling corrections by me incorporated):

> "I am writing this letter because you won't listen to me. One of the reasons why I don't want to go back to Australia is because we have got Family and Friends here in England. I have made lots of new friends at my new school….My school has helped me a lot with my maths, reading, spelling and history. I really like history. Another of the reasons is that I have a cute baby sister that has just begun to crawl, named Molly. I would "LOVE" to see her grow up. Mum, on Thursday the judge will decide if I shall move back to Australia. This is the some [?] thing that I do not want to do. I want to live in England with my dad. My dad tells me the truth and tells me what is going on. That is why I love him and trust him. If you love us as much as you say you do, why are you trying to move us back to a country where we do not want to live. Please do not make us move back. By [Clare]"

> "I am writing this letter because you won't listen when I try to talk. I don't want to go back to Australia because I have friends and family here. I have a baby sister called Molly and I want to grow up with her. In school I have learnt more than normal. My favourite subject is maths and English. I have some lovely friends at my new school…If we go back to Australia we will never see our family again. If we go back we will never see our daddy again. We love it here and we don't want to go back. You're saying that daddy's lied when actually you have!!! From [Harry]"

20. Clare's letter to the judge, which was written at the invitation of the CAFCASS officer, read:

> "I would like to stay in England because all our family is here and I love them very much. Also we have a 10 month baby sister that we also love to bits. So, people might say we are very young to make this big effort in staying in England but, I know what is right for me and I want to stay in England. Please!!! From [Clare] P.S And I would like to live with Dad."

The CAFCASS evidence

21. The CAFCASS officer's written report set out the following information that she had obtained from the children:

    i) Harry, the youngest child, told her that they came here for the Christmas holiday and then decided that they did not want to go back because they have no family in Australia and wanted to be with their family here. He felt that his mother did not listen to them and that she just said that their father had told them what to say. There were things he missed about Australia and he wanted his dogs with him but he would be much happier if he lived with his father because then they could live in England, whereas his mother would make them return to Australia. He thought that living half with his mother and half with his father would make him happy.

    ii) Peter wanted to stay in England as he feels like part of a big family here, whereas in Australia it was just them and their mother, and he said that their baby half-sister was the main reason they wanted to come here. His ideal scenario was to live with his father here but to have his mother here too and to see her. He told the CAFCASS officer that he would be angry with his mother if they went back to Australia and would think it was her fault for going to court. He conveyed to the CAFCASS officer that going back to Australia was not commensurate with his idea of happiness. He said that he had been worried since the court proceedings began and it had been said that he may have to return to Australia.

    iii) Clare told the CAFCASS officer that she wants to be in England living with her father and her siblings and amongst her extended family and also to see her mother. She said that she had been sad a lot of the time when living with her mother and only occasionally seeing her father, as she always really missed him. She said that if she returned to Australia, she would cry and cry like before when she missed her father. The CAFCASS officer thought that the most important relationship for her appeared to be with Molly, about whom she spoke a lot. The CAFCASS officer reported that Clare thinks that her mother had lied to them as she said that going to court was not about going back to Australia whereas it had turned out that it was. She said that Clare feels that she will be angry with her mother if they are returned to Australia. Clare was also worried about how life would be in that event, as she knew her mother had no money and her father paid for everything. Clare was clear that she identifies as English rather than Australian.

iv) Simon, the oldest child, also valued having family around him in England and said that being around his father had a sense of everything being "better" and somehow easier. He too has always identified with being English rather than Australian. He told the CAFCASS officer that if they returned to Australia he would feel "awful". He said that if they return to Australia, he would feel that his mother was responsible and that would not help their relationship; he felt that she had agreed to them staying, then she had come to England and "started all this court stuff". He would like to stay with his father but have his mother nearer to them.

22. Most of the concluding section of the CAFCASS officer's report can be found set out at paragraph 55 of Judge Bellamy's judgment. It contains her professional assessment of the situation. She said of Clare that she was more mature than the average child of her age and of Simon that he was particularly mature and articulate for a 13 year old; In oral evidence she commented that all the children were very mature. She found the children highly articulate about their situation, demonstrating a great deal of insight. They gave a nuanced explanation with regard to their needs. She had no sense that there was a "script" being rehearsed as you might find with children who have been influenced by a parent. She said that "their wish to remain in England appears to go beyond a preference to live with their father in England" and that a striking feature of her discussions with them all was that it was important to their sense of identity to live within their wider family. She gave the view that the return to Australia would "not only result in the children feeling angry about their express wishes being disregarded, but would place them back within a situation that was likely to result in further parental conflict about money". She advised that if the court decided on a return to Australia, the parties must make it clear to the children that this was not for ever and that a court in Australia would make a full assessment and decide on the long term arrangements.

23. We have been provided with the transcript of the CAFCASS officer's oral evidence. What Judge Bellamy took from that oral evidence is set out at paragraphs 56 to 58 of his judgment. It does not add or subtract especially from what he had derived from her report, although he did particularly note that the children had not said anything negative about their mother's care of them whilst living in Australia.

Judge Bellamy's meeting with the children

24. Judge Bellamy explained, at paragraph 60, that in the course of writing his judgment he had become concerned that only Clare had been given an opportunity to write a letter to the judge, and that the CAFCASS officer had not addressed in her report the issue of whether the children should meet the judge and nor was it raised with her in oral evidence. An email exchange then took place between the judge and the parents' counsel and the judge decided he would meet the children, which he did by video link, spending around 20 minutes with them. A local CAFCASS officer was in attendance.

25. The judge set out what transpired at paragraphs 62 to 65 of the judgment and there is a brief note of the meeting at B124 in the bundle, apparently prepared by the judge's clerk. Amongst other things, Judge Bellamy explained to the children, in

simple terms, the purpose of the hearing that had just concluded. He invited the boys to tell him what they would have written to him had they been given the same opportunity as Clare had. They all wanted to stay in England. Clare seems to have conveyed a similar impression. However, it can be seen from paragraph 126 of the judgment that the judge did not get any sense from his meeting with the children that there would be likely to be an extreme reaction to an order for summary return.

26. We have seen the emails between the judge and the parties' counsel that preceded this meeting between the judge and the children. It can be seen that the judge said that the purpose of it was to "ensure that the children understand the process and to reassure them that their views, placed before the court through Ms Adams, have been heard and understood". Counsel referred the judge to paragraph 53 of *Re KP (Abduction: Child's Objections)* [2014] 2 FLR 660 and it featured in the judgment, along with the 2010 *Guidelines for Judges meeting children who are subject to family proceedings* [2010] 2 FLR 1872. It is perhaps worth noting that the judge observed that if either party wanted to make any further submissions in response to the feedback they received as to the content of the meeting, arrangements would have to be made for that to happen promptly in view of his intention to hand down the judgment very soon. In the event, matters proceeded directly to the circulation of the draft judgment, some time later on the day of the meeting, without any prior notification to the parties of what had occurred. One of the father's arguments in this appeal is that the judge therefore failed to follow the guidance in *Re KP* and was wrong not to have reported back to the parties after the meeting and invited further submissions before finalising his judgment.

The parents' perspective on the children's views

27. The mother's case was that the children had been very happy living in Australia where they had a busy and active life and lots of friends and they were doing well at school. She did not dispute that they had said they wanted to stay in England. She considered that they had had a great time with their father, who had spoiled them, and that this had influenced their views. She also said that in her view the father had exposed them to considerable pressure to stay with him in England and was emotionally abusing them in this way. In her view, he was marginalising her in their lives and undermining her position as their mother. She thought Harry and Peter did not really want to stay here and had been influenced not only by the father but also by the other children. Indeed, she said (B59), speaking of all the children, that she thinks that deep down they would like to go back to Australia but felt that it may upset their father. In so far as Clare and Simon did want to stay here, she believed that was born of their yearning for the father to play a larger role in their lives which could, in fact, be achieved even if they returned. In Hague Convention terms, she did not accept the father's case that the children were objecting to returning to Australia.

28. The father's case was that the children had become absolutely insistent that they would not return to Australia. His view was that they were not doing very well academically in Australia and that, rather than being happily settled there, they had told their mother during 2014 that they wanted to live in England instead. He said that they were very distressed by the proceedings and kept asking for reassurance that they would not be forced to return to Australia. His argument that

the mother in fact agreed to them remaining here was rejected by the judge so needs no further consideration. However, Judge Bellamy acknowledged the evidence of the CAFCASS officer that the children appear to have believed that the mother was consenting to them remaining although he commented that, given their desire to stay here, it was at least possible that they heard what they wanted to hear and not what the mother actually said to them (paragraph 95).

Judge Bellamy's decision: objections

29. The judge accepted that if any of the children objected to returning to Australia, there would be no question but that they were of an age and degree of maturity at which it was appropriate to take account of their views. He also accepted, at paragraph 104 that:

> "…the children's wishes, feelings and preferences are clear. With varying degrees of strength each of them has made it plain that they wish to remain in England and that they wish to remain in the care of their father. They are enjoying having contact with their wider family, most of whom they did not see during the years they were in Australia, and in particular they are enjoying living with Molly. Ms Adams' interpretation of what the children told her is that in this respect their circumstances in England cannot be replicated in Australia. She considered this to be more than a preference to remain in England."

30. He also noted at paragraph 105 that the children did not say anything negative to the CAFCASS officer about their mother's care and were not rejecting her. At the time of the CAFCASS interview, all of them wished to see her regularly. He then went on to consider each child separately, acknowledging that there is a "fairly low threshold" in determining whether a child objects. He accepted that each child had a wish to remain here but he did not think that in any of their cases it amounted to an objection. In order to deal with the challenge made to this in the appeal, I will need to examine closely how Judge Bellamy expressed himself in relation to each child. Accordingly, I propose to set out here the relevant paragraphs of his judgment in their entirety:

> "*Harry*
>
> 108. I referred earlier to a letter written by Harry to his mother. In it he sets out reasons for staying in England, not least because he wants 'to grow up with' Molly. He has nothing negative to say about Australia or about his mother's care of him whilst living in Australia. His primary concern appears to be that if he goes back to Australia 'we will never see our family again…we will never see our daddy again'. Against that, he told Ms Adams that he misses his old friends in Australia, 'as well as the spiders and the snakes'. He misses his swimming pool and the quad bikes. He misses, in particular, the family's two dogs and

'wants to be with them'. In her oral evidence Ms Adams said that Harry 'misses his dogs terribly'.

109. So far as this last point is concerned, I observe, in passing, that it would be surprising to the point of being highly improbable for the father to be unaware of the extent of Harry's distress. He clearly has the financial resources to arrange for the dogs to be brought to England. He has had more than sufficient time to do so. I find it distinctly odd that the father has not gone out of his way to resolve this issue.

110. Acknowledging, as I do, that in determining whether a child objects to being returned there is a 'fairly low threshold requirement', I am nonetheless not satisfied that it can properly be said that Harry objects to returning to Australia. He has a wish and a preference to remain in England but in my judgment he does not object to returning to Australia.

Peter

111. Peter clearly wishes to remain in England. He has made that clear to Ms Adams and to me. He told Ms Adams that his ideal scenario 'was to live in England with his dad, but have mum here and see her too'. He said that he 'was finding it a bit of a struggle at his new school'. He had had one good friend in Australia. Like Harry, Peter did not express any objections that related to Australia or to life in Australia. He has nothing negative to say about his mother's care of him whilst living in Australia.

112. As with Harry, notwithstanding the fairly low threshold requirement I am not satisfied that it can properly be said that Peter objects to returning to Australia,

Clare

113. In her letter to her mother and during her meeting with me, Clare emphasised the importance for her of living amongst her wider family and friends. It is clear that she has a particularly strong wish to live with Molly. She makes the same points in the letter she wrote to the Judge. In my judgment these are an expression of wishes, feelings and preferences and not of an objection to returning to her country of habitual residence. I accept that in her discussions with Ms Adams Clare's views were expressed with greater force than those of her brothers. I acknowledge that unlike her brothers Clare did make one negative comment about Australia saying that she 'was actually quite lonely in Australia cos it was just me and my mum – the

> only two girls in the house'. However, other concerns she expressed are to do with financial issues which are more to do with the relationship between her parents than with living in Australia. For example, Clare is the one who has the most vivid memories of telephone arguments between her parents concerning money; she is the one who expresses concern about how they would survive financially if they returned to Australia. Clare is also the one who harbours the greatest degree of anger towards her mother for not listening to her. After careful thought and reflection I have come to the conclusion that notwithstanding the fairly low threshold requirement to establish a child's objections, I am not satisfied that, in Convention terms, Clare does object to returning to Australia.
>
> *Simon*
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> 114. Simon, too, wishes to remain living in England with his father. He was only 5 years old when he moved to live in Australia. Until they came to England in 2014, 'Australia was home and they knew no different'. However, he says that he has always identified with being English. Like his younger siblings, Simon does not express objection to Australia, or to his life in Australia or to his mother's care of him whilst living in Australia.
>
> 115. I am in no doubt that this does not amount to an objection to being returned to Australia."

The appeal against the judge's finding that the children did not object

31. Mr Anderson for the father and Miss Chaudhry for Simon and Clare made common cause in criticising the judge's finding that the children did not object as untenable on the evidence. It was submitted that although the judge had cited the law correctly, referring to *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, he had failed to apply it properly. It was submitted that he should have treated "object" as an ordinary English word but in fact gave it a special meaning. He failed, it was said, to give the weight that should have been given to the evidence of the CAFCASS officer about the strength of the children's views, and to the other material which established that they were objecting to a return to Australia.

32. In *Re M*, I said:

> "69. In the light of all of this, the position should now be, in my view, that the gateway stage 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. Sub-tests and technicality of all sorts

> should be avoided. In particular, the Re T approach to the gateway stage should be abandoned."
>
> "76. I now turn to how the law will work in practice. I do not intend to say a great deal on this score. The judges who try these cases do so regularly and build up huge experience in dealing with them, as do the CAFCASS officers who interview the children involved. I do not think that they need (or will be assisted by) an analysis of how to go about this part of their task. In making his or her findings and evaluation, the judge will be able to draw upon the entirety of the material that has been assembled in relation to the child's objections exception and to pick from it those features which are relevant to his or her determination. The starting point is the wording of Article 13 which requires, as the authorities which I would choose to follow confirm, a determination of whether the child objects, whether he or she has attained an age and degree of maturity at which it is appropriate to take account of his or her views, and what order should be made in all the circumstances. What is relevant to each of these decisions will vary from case to case.
>
> 77. I am hesitant about saying more lest what I say should be turned into a new test or taken as some sort of compulsory checklist. I hope that it is abundantly clear that I do not intend this and that I discourage an over-prescriptive or over-intellectualised approach to what, if it is to work with proper despatch, has got to be a straightforward and robust process. I risk the following few examples of how things may play out at the gateway stage, trusting that they will be taken as just that, examples offered to illustrate possible practical applications of the principles. So, one can envisage a situation, for example, where it is apparent that the child is merely parroting the views of a parent and does not personally object at all; in such a case, a relevant objection will not be established. Sometimes, for instance because of age or stage of development, the child will have nowhere near the sort of understanding that would be looked for before reaching a conclusion that the child has a degree of maturity at which it is appropriate to take account of his or her views. Sometimes, the objection may not be an objection to the right thing. Sometimes, it may not be an objection at all, but rather a wish or a preference."

33. I do not propose, in what I say here, to alter one word of those passages. I re-iterate that an over-prescriptive or over-intellectualised approach is to be discouraged and that a straightforward and robust process is required. The judge must ask him or herself simply, "Does the child object to being returned to his or

her country of habitual residence?" Looking at the evidence that was before Judge Bellamy, the answer that comes instinctively to mind is, "Yes". Why, therefore, did he not find that?

34. It seems to me that the answer may lie in the way in which matters were approached on behalf of the mother. The cross-examination of the CAFCASS officer by Ms Renton, then acting on her own for the mother, is revealing, in my view. At B83 (page 6 of the transcript of the CAFCASS officer's evidence), Ms Renton introduced the concept of "a Convention objection", suggesting to the officer that "a Convention objection is when a child cannot imagine a return to a country, to the point where they cannot think of anything positive about a country, irrespective of who would return them", reiterating that it required "children who cannot contemplate going back to a country with no positive features about that country at all". She then put to the officer that the children *did* have positive things to say about Australia, as the officer accepted, agreeing that it was "not a wholesale rejection of Australia". This approach was reflected in Ms Renton's submissions to the judge, which he summarised at paragraph 101 of the judgment. As recorded by the judge, she submitted that:

> "In this [Hague] context an 'objection' means a wholesale objection to returning to the country of habitual residence. Invariably such a child cannot think of anything positive to say about that other country. That is not the case here. When speaking to the children [the CAFCASS officer] approached her task using the wrong test."

35. In her definition of an objection, Ms Renton had, in my view, introduced an unwarranted gloss on the simple words of Article 13. It is not necessary to establish that the child has "a wholesale objection" to returning to the country of habitual residence and "cannot think of anything positive to say about that other country". The exception is established if the judge concludes, simply, that the child objects to returning to the country of habitual residence. Mr Williams QC reminded us, rightly, that the Convention is applicable in a large number of countries and that "objects" has an autonomous meaning, but he did not advance a proposed definition in amplification or explanation of the words of the Convention itself. That was prudent, in my view. Whether a child objects is a question of fact, and the word "objects" is sufficient on its own to convey to a judge hearing a Hague Convention case what has to be established; further definition may be more likely to mislead or to generate debate than to assist.

36. Judge Bellamy did not indicate in his judgment whether he accepted Ms Renton's formulation or not. However, there are some indications that it had influenced his thinking. First, he did not intervene when Ms Renton put it to the CAFCASS officer but permitted her cross-examination to proceed upon that basis. Second, when he analysed the children's positions with a view to determining whether they objected to returning to Australia, he particularly remarked upon them largely having nothing negative to say about Australia or about their mother's care of them there. This was not necessarily irrelevant to his determination of whether they objected but, in the context of the submissions made on the mother's behalf, his special focus upon this aspect of matters does generate the impression that he

was proceeding on the basis that the children could not be objecting unless they had negative things to say about their country of habitual residence.

37. Further reinforcement is derived from the absence from this portion of the judgment of any reference to some of the stronger comments made by the children about their wishes, which one would have expected to steer the judge in the direction of a finding that the children objected, had he been looking for objections in the ordinary sense of the word. I have not overlooked the judge's explicit recognition, in paragraph 104, that the children had all made plain that they wish to remain in England and that the CAFCASS officer considered this to be more than a preference. However, in the detail of what the children said, there was material which would have assisted the judge in evaluating whether or not they were objecting to returning, but which does not feature in his analysis of the issue. I have set out the relevant material earlier on and will not rehearse it all here. By way of example, I note first the terms of Clare's letter to the mother. In a passage which the judge omitted from his quotation from the letter at paragraph 45 of the judgment and did not mention in his analysis of the children's views, Clare said that "on Thursday the judge will decide if I shall move back to Australia. This is the some thing [*sic*, I think, doing the best I can with the handwriting] that I do not want to do" and she ended the letter, in a passage also omitted from the judge's quotation, by saying "Please do not make us move back." Secondly, Clare told the CAFCASS officer that she would cry and cry if she returned to Australia and that she feels she will be angry with her mother if they were returned but these comments do not feature in paragraph 113 of the judgment. Similarly, there is no reference in paragraph 111 to Peter having told the CAFCASS officer that he would be angry with his mother if they went back to Australia and that he had been worried since the court proceedings began and it was said that he may have to return. In respect of Simon, there is no reference in paragraph 114 to him having told the CAFCASS officer that if they returned to Australia he would feel awful, that he would feel his mother was responsible, and that it would not help their relationship.

38. Ms Renton's formulation might perhaps also have been influential in the conclusion that the judge seems to have reached that the CAFCASS officer's approach was deficient. At paragraph 59 of the judgment, Judge Bellamy said:

> "One of the difficulties in this case relates to the approach Ms Adams took in her discussions with the children. Although at the beginning of her report she notes that she had been tasked by the court to report as to 'the children's objections, if any, to a return to Australia', thereafter the word 'objection' does not appear either directly or by inference. There is no doubt that Ms Adams ascertained the children's wishes and feelings. There is equally no doubt that she ascertained their preference. She did not directly consider with the children whether they objected to returning to their place of habitual residence, Australia."

39. This passage is puzzling. Its premise seems to be that objections are different from wishes and feelings, rather than just one variety of them, and that the CAFCASS officer should specifically have investigated "objections" and should have done so

directly with the children. As I see it, however, the CAFCASS officer's task is to ascertain what the children are thinking and to convey that to the judge so that he can evaluate it with a view to making his factual finding as to whether they object. A CAFCASS officer does not normally ask the children in terms whether they object to a return, but instead talks around the subject with them, letting them voice their views and their feelings in whatever way they wish. Sometimes a CAFCASS officer will describe what he or she has learned from the children in terms of "preferences" or "objections". That can only be taken as a way of describing the children's views to the judge, not as a definitive classification for Article 13, but the judge has to factor it into his thinking because, properly interpreted, it is a description that may tell him something about the nature of the children's stance.

40. Perhaps a consideration of the judge's paragraph 59 does no more than reinforce the importance of sticking to the ordinary meaning of the word "object" and leaving it to the CAFCASS officer to collect facts that may be relevant to that, and to the judge to make his finding, taking them into account. For a discussion of the difficulties inherent in attempting to define an ordinary uncomplicated English word, see *Cozens v Brutus* [1973] AC 854 which I am grateful to Moore-Bick LJ for having drawn to my attention. To reiterate, "object" means "object", that is all.

41. In the end, it does not matter how the judge reached his conclusion that the children were not objecting. In my view, it was a conclusion which was not open to him on the evidence before him, including the CAFCASS officer's evidence as to what the children said to her, which was valuable factual material, whatever her understanding of the word "objects". In my judgment, the totality of the evidence clearly established that the children *did* object to returning to Australia. That being so, and there being no question but that they have attained an age and degree of maturity at which it is appropriate to take account of their views, I would overturn the judge's determination that the gateway to discretion was not open.

Judge Bellamy's decision: discretion

42. Judge Bellamy said that had he found that the children objected, he would still have ordered their return to Australia for reasons which he set out. He directed himself in conventional terms as to the law in relation to the exercise of his discretion, referring to *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251. He reminded himself of the policy of the Hague Convention. He then went on to consider other factors that were relevant to the discretionary decision. Given that he was now working on the premise that the children objected to a return, his examination of this aspect of the case possibly commenced rather inauspiciously at paragraph 120, in that he proceeded on the basis that the children "express a preference to remain in England", although he did comment that Clare's preference was a strong one. He took it that at the heart of the children's position was a desire to remain amongst their wider family, and in particular to live with their half-sister, and a wish to remain in the primary care of their father. He said there was a serious issue about the extent to which the children's views were their own. He took into account that the CAFCASS officer's view was that the children were not speaking to a pre-prepared script and had not been influenced by their father taking them on expensive holidays, but considered that there were factors

that suggested that their views had been coloured by their father, which he listed as follows:

> "120. ….. In her letter to her mother, Clare says that 'My dad tells me the truth and tells me what is going on'. In discussion with Ms Adams she said that she was worried about how life would be if they returned to Australia 'as she knew her mum had no money and her dad had paid for everything since they split up'. In his letter to his mother, Harry expressed the belief that 'if we go back to Australia we will never see our family again, if we go back we will never see our daddy.' Simon told Ms Adams that being around his dad 'had a sense of everything being "better" and somehow easier', an observation which could be an indication that he, too, is aware of the greater financial security when living with his father compared to the financial uncertainty and unpredictability of life with his mother."

43. Judge Bellamy accepted the submission made on behalf of the mother that the children had been living in "a bubble of respite" and found that, in consequence, there was an artificiality about the way in which they had arrived at their views, which had been coloured, not by unhappy memories of Australia, but by their comfortable existence with their father and "by the climate he has created which is a climate based on negativity towards the mother and the subtle use of his wealth". He put into the balance that the children had lived with the mother continuously for more than seven years after the parents' separation and that they had not criticised her care, and he considered that it was not compatible with their interests for there to be an abrupt change of primary carer brought about by the wrongful act of the other parent.

44. The judge's discretionary exercise was incomplete, in my view. Counsel then acting for the father had submitted (as the judge set out at paragraph 117 of the judgment) that the judge should also have had regard to the fact that if the children were to return to Australia at present, no arrangements were in place for accommodation or education and that they would be returning to uncertainty, and also that there would be no extended family support there. The judge did not mention these factors in his own analysis of the position. Indeed, from paragraph 117, it looks as if he may have assumed that they would be addressed, at least in part, by the father's agreement to provide financial support if the children did return whereas I do not think they can be treated as having been resolved in this way. True it is that the judge was not engaged in a full welfare hearing but considering a summary return. But the range of considerations that enters into the exercise of the discretion whether to order a summary return is wide, as the passage that the judge cited from *Re M (Abduction: Zimbabwe)* shows, and in my view Judge Bellamy's focus was too narrow .

45. In all the circumstances, it does not seem to me that it would be helpful to engage further in a critique of Judge Bellamy's reasoning as to discretion. Even as things stood at the time of the hearing before him, there were other matters which should have been considered, and there have been developments since then which the

parties were agreed would have to be considered if we decided that the children objected and there was therefore a discretion to be exercised. Accordingly, I intend to move on to my own consideration of what order should be made in relation to return. It should be noted that no one suggested that the children should be split, with some returning to Australia and some not, so I have treated them as a single entity, even though I am conscious that they all have their individual personalities and views.

46. Events after Judge Bellamy's decision (or at least the mother's version of them) are described in two statements from the mother, dated 21 July 2015 and 23 July 2015, prepared in support of her applications for the immediate transfer of the children to her care and for the committal of the father to prison for failure to comply with the orders and undertakings made by Judge Bellamy.

47. The judge had offered to explain his decision to the children but the parents decided to communicate it jointly to the children themselves. On the mother's account, this did not work out well. According to her, the father became very angry during the process and she left because she did not think the children should witness a scene. There were then difficulties over her contact with them and, according to her, further inappropriate behaviour on the father's part. The mother describes the children, particularly Simon, persistently questioning her as to why they should return to Australia. At times, the children refused to come for contact unless she stopped Australia. The mother believed that the father had influenced the children in their stance and was alienating them against her.

48. In the bundle are copies of text messages between Simon and his mother from 3 July 2015 onwards, so one can see first-hand what was passing between them. The clear message from Simon is that he does not see why they should return to Australia and is resistant to doing so. What is also clear, however, is that he loves his mother and she loves him and that, aside from the issue over Australia, there is a solid relationship between them. Indeed, there is no reason to doubt that there is a solid relationship between the mother and all of the children; their love for her and hers for them emerges from all of the documentation.

49. When the children were given permission to appeal, permission was also given for two statements to be filed from their solicitor. In those statements, Ms Fleetwood set out what all four of the children said to her. She saw the four of them on 21 July, and saw Simon and Clare again in August. Much of what they said followed the same lines as what they had said earlier in the proceedings. In addition, Simon was adamant that he would not be getting on a plane and said that if he was forced to return to Australia, he would run away. He said that his siblings were of the same opinion and would join him. He said that anyone would have the struggle of their life if they tried to force him to go back. He said he had a good relationship with his mother and thought it would get better if she did not keep going on about taking them back to Australia. He asked Ms Fleetwood to do anything she could to make sure he remained here and said he did not understand why the judge had not listened to his views. Clare said that she could not be forced to go back to Australia. When she and the solicitor talked about the court decision that she had to return to Australia and the fact that there would be further proceedings in Australia to decide whether she comes back to England, Clare asked what if the judge in Australia does not listen to her either. When there was discussion about

the possibility of the appeal being unsuccessful, she said she would talk to her mother and the judge and her lawyer and say why she could not go back. She told Ms Fleetwood that she does not even like seeing her mother at the moment because she so badly does not want to go back to Australia. We also get from Ms Fleetwood that, on Clare's account, there was an unsuccessful attempt to persuade the children to go to their mother's house on 23 July in preparation for flying back to Australia, when the children refused to go with their mother.

50. The picture that emerges from the whole of the evidence is that the children have very clear views and have been able to give reasons for them. I respect Judge Bellamy's assessment that the children's views may have been influenced by the circumstances in which they found themselves; it is often so. However, that did not prevent them from being genuinely and strongly held views and, looking at the totality of the evidence, I think they are. They are views which have endured for some time, notwithstanding the emotional turmoil that the children must have been suffering during the last months. These are children whose maturity impressed the CAFCASS officer, particularly Simon and Clare. Her professional assessment in her report (paragraph 55) was that all four of them were highly articulate about their current situation, demonstrated a great deal of insight and gave nuanced explanations regarding their needs, and expressed wishes to remain in England which appeared to her to go beyond a preference to live with their father here. When she was cross-examined about her comment that there was no sense of a script being rehearsed as you might find with children who have been overtly rehearsed, and the issue of influence was carefully explored with her, she did not appear to be lacking in a proper understanding of it and does not seem to have resiled significantly from her assessment that the children showed insight and gave reasoned explanations for their clear wishes. Some way into the relevant cross-examination, for instance, at page 20 of the transcript, she said that she thought the children "were very clear about what their views were and what it was they thought and felt" and later she said:

> "I felt very strongly that these children,….all four of them, really knew what they were talking about. They expressed themselves so well and so beautifully about everything, they are ….very mature, very articulate and I did explore things carefully, I did ask them challenging questions, to look at different perspective and there is just a clear sense there that being in England was – they appeared to feel more at home being clear and they gave very clear and cogent reasons as to why that was. I didn't sense that it was about being manipulated or coerced, but I do accept that there's a context always to children's experiences and there are loyalties to different parents and so on, but in many ways they really were quite remarkable how they expressed themselves and ….they had a great deal to say about their particular experience. "

51. In the circumstances, even if I were to be able to make a definitive determination as to what, if any, influence has been brought to bear on the children (which would be nigh on impossible without the benefit of oral evidence and which is a

matter best left to such welfare hearing as takes place), I do not think it would take matters very far. The decision as to whether the children should be returned has to proceed upon the basis that if they were, it would be against their strongly held wishes. The CAFCASS officer said that if they were made to return, it would probably make settling back down in Australia difficult and cause difficulties and disruption to their emotional well-being, even if it would not be impossible. There is evidence that some of the children might feel angry with their mother if it occurred. The CAFCASS officer's evidence was that they appeared to have understood that they were staying here and that their mother and the dogs were coming over. The fact that the judge rejected the father's case about acquiescence does not alter how the children saw things in this regard. Judging by what they themselves have said, there is a possibility that their resentment towards their mother for pursuing this option would get in the way of their relationship with her, at least in the short term. It is sad to see that the passage of time since the hearing before Judge Bellamy and the continued litigation has done nothing at all to mend fences.

52. Judge Bellamy was rightly concerned about the children being abruptly moved from one carer to the other by the wrongful act of the other parent. However, a considerable amount of time has now passed since the children were wrongfully retained here in January. A particularly important, and rather unusual, feature of this case is that the children's home in Australia is no longer available to them. If it is established that this situation has come about as result of the reprehensible conduct of the father, as is the mother's case, that is likely to demonstrate a failure on his part to pay proper regard to the children's interests. For present purposes, however, it is the mere fact that circumstances in Australia have changed completely since the children left that is significant. Were they to return, it would have to be to rented accommodation which, I will assume, the father would provide. Their return to school would also have to be organised, but I will assume that that could be arranged. In contrast, they have become used to living in their father's house here with Molly, all have now started in English schools, and they have appreciated having their extended family around them. None of that would prevent them from returning to Australia in due course if that were to be the decision of the court making the long term welfare decision. However, I need to bear in mind that the return which is presently being considered is not a return which would necessarily endure in the long term. It would be subject to whatever welfare decision was then made by the Australian court (or, of course, the English court if the conditions for a transfer of jurisdiction were thought to apply, see Article 8 of the 1996 Hague Convention). Normally, little weight attaches to the fact that a return to the country of habitual residence may ultimately turn out only to be for such period as enables a court there to determine the residence dispute and authorise relocation. This is because the return is achieved speedily and the children can easily take up their former lives again whilst the court proceedings take place. In the present case, however, that is not so, given the time that has elapsed and the considerable changes that have occurred during that period.

53. I have given full weight to the mother's submission that, if the children are not returned to Australia, it may be impossible to contemplate them ever returning to live there and that the outcome of the present application may turn out to be determinative of the welfare decision. I have taken into account, too, that she

considers that if they were to be returned, once they were back in Australia and away from the father's influence, they would return to the happy thriving children they were. I have also given careful consideration to her submission that there is a risk that if they remain here whilst the welfare decision is made, they may be turned against her by the father. This submission drew upon the difficulty that there is presently in their relationship with her after a period living with their father.

54. I accept that both of the available options are attended by risks, just as both carry potential benefits. It is impossible to forecast just how things will work out on either scenario. The present problems over contact with the mother are extremely unfortunate. If it were to be established, in the welfare proceedings, that they have been generated or encouraged by the father, or compounded by his approach, it would count very heavily against him as a long term carer for the children. In so far as one can judge from the material available, it is not the children's relationship with their mother that is the problem but the emotion generated by the application for a summary return to Australia, no doubt aggravated by the protracted nature of the present proceedings. If the mother's attitude to Simon in her text messages is a reliable guide, her response to the children's persistent negativity about a return to Australia has been loving and forbearing. The children need to try to see things from her point of view as well as from their own. She has always been their primary carer in Australia. She brought them over for a holiday at Christmas and then suddenly found everything changed, without any consultation with her, so that instead of having them back to start the new school term as expected and agreed, they did not return, she lost her home, and she had to leave Australia too.

55. It is clear that the children love their mother and want to see her and it is to be hoped that once the present round of litigation is over, they can resume normal contact with her. However, as things stand at present, I am not confident that the position would be improved by returning them summarily to Australia. Indeed, as things have been allowed to develop, with the question of an immediate return to Australia having come to dominate family life, in my view it may prove to be a distinctly unhelpful step.

56. Weighing up all the circumstances, including in my consideration the very important matter of the policy of the Hague Convention, and paying attention also to the abuse that Judge Bellamy found there was by the father of his control of the family finances, I have concluded that the correct exercise of discretion in this case would be not to order the return of the children to Australia pursuant to the mother's application. I would therefore allow the appeal, substituting a finding that the children objected to returning to Australia and, in the exercise of the resulting discretion, I would dismiss the mother's application for their summary return.

57. It is unnecessary in these circumstances to deal with the challenge to the judge's interviews with the children. I would only emphasise that when a meeting is to take place between a judge and the children involved in the proceedings, it needs very careful planning. I am not persuaded of the wisdom of a meeting set up in the way that this meeting was and at this particular stage of the proceedings. Furthermore, it is important that whenever there is a meeting between the judge

and a child or children, care is taken to ensure that the parties have the opportunity to make submissions about what emerges. I obviously do not know what, if anything, they would have chosen to say in this case had the opportunity been provided but I can give an example of the sort of matter that might have been addressed. The judge explained to the children the basics of the Hague proceedings and it seems likely that he will have conveyed to them (as I do not think the CAFCASS officer had) that the return to Australia would be on a temporary basis only, pending a welfare hearing. The father might have wished to make use of the fact that, having learnt this, the children still maintained their position that they wanted to stay in England in support of his case on objections and/or discretion and therefore to make submissions about its importance.

58. I do not intend to say anything about the complaint that the children were not joined as parties in the proceedings below. If that was a problem, it has been remedied by their full participation in the appeal process. I do stress again, however, how important it is for consideration to be given at the earliest possible stage in Hague proceedings to how the children are to participate.

59. There is much for this family to sort out. These proceedings in no way resolve the long term arrangements for the children, whose best interests may or may not be served by them returning to live in Australia. I urge them all to approach the decisions that need to be made in a constructive way, making use of professional help such as mediation if they are not able to resolve things by themselves, and getting on with it as quickly as possible.

LORD JUSTICE RICHARDS:

60. I agree.

LORD JUSTICE MOORE-BICK:

61. I also agree.