RE C (ABDUCTION: SEPARATE REPRESENTATION OF CHILDREN)
[2008] EWHC 517 (Fam)

Family Division

Ryder J

14 March 2008

Abduction – Separate representation – Convention and non-Convention tests – Best interests – Expense and delay – Distinct defences

Following the family's move to a property in France, the parents' relationship deteriorated. In the course of French divorce proceedings, the French property was assigned to the mother, for her use with the children. The father duly left the French property, initially moving to Spain to live with his parents but later returning to France to rent accommodation near the French property. Shortly before the father was expecting to have contact with the five children, the mother and the children returned to England. The father brought proceedings under the Hague Abduction Convention for summary return of all five children, aged 16, 13, 11, 9 and 5, to France. Because the Convention did not apply to children aged 16 and over, the father's Hague proceedings had to be supplemented by a request for the eldest child's return to France under the English court's inherent jurisdiction. The mother argued that the children were not habitually resident in France; that the father had abandoned the family when he moved to Spain; and that the children objected to a return. The four older children applied to be joined as parties to the proceedings, having instructed a solicitor who had concluded that all four were articulate and of an age and maturity at which it was appropriate to consider their views. All four children wished to raise the possibility that they had retained their own habitual residence despite the actions of their parents, and also a defence based on Art 13(b) in relation to their potential separation as a result of the court's decision.

Held – joining all four children as parties, and directing that the three younger children were to be represented by a guardian ad litem –

(1) The non-Convention test of best interests was to be applied to the joinder of the eldest child; the Convention did not apply to him, and Convention and non-Convention principles could not be elided simply because the child had previously been subject to the Convention. The principles in relation to separate representation of children set out in *Mabon v Mabon* [2005] EWCA Civ 634 were directly applicable to non-Convention applications for summary return, because such applications involved a welfare enquiry within the inherent jurisdiction of the English court, albeit in summary form (see paras [15], [19], [22], [23], [36]).

(2) It was in the eldest child's best interests to be joined as a party and he was entitled to instruct the solicitor of his own choice; it would be extraordinarily paternalistic and, arguably, destabilising for the court to determine that it was not in the best interests of an articulate, mature and intelligent 16-year-old who satisfied the conditions set out in r 9.2A(b) of the Family Proceedings Rules to be separately represented. Welfare considerations were raised in this non-Convention application for summary return that could not properly be put by the mother, whose evidence in relation to the four younger children had to be focused on and limited by Convention practice (see paras [16], [37], [38]).

(3) The proper test for the joinder of children in Convention proceedings was 'whether the separate representation of the child will add enough to the court's understanding of the issues that arise under the Hague Convention to justify the intrusion and the expense and delay that may result'; that test was to be applied without gloss (see paras [31], [35]).

(4) The younger three children, to whom the Convention test applied, should also be joined as parties to the proceedings: they were able to put submissions and defences distinct from those put by the mother that would add to the court's understanding of the issues; and little additional expense and delay would be involved, having regard to the representation of the eldest child. By the nature of their ages and understanding, and of their experiences to date, the substance of the issues in the proceedings had already well and truly intruded into their lives; not having the opportunity to say what they thought and why they thought it was more likely to cause them harm than allowing them to express their views and wishes, and allowing them to have their positions advocated professionally by their lawyers. It would be emotionally harmful for any one of the four children to be refused permission to be separately represented if another had been permitted to be so (see paras [16], [39], [43], [44], [46], [47]).

Statutory provisions considered

Children Act 1989

Family Proceedings Rules 1991 (SI 1991/1247), rr 9.1(3), 9.2(1), 9.2A(b), 9.5

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Arts 6, 8

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 4, 12, 13(b)

United Nations Convention on the Rights of the Child 1989, Art 12

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Arts 10, 11(2)

Cases referred to in judgment

A; HA v MB (Brussels II Revised: Article 11(7) Application), Re [2007] EWHC 2016, [2008] 1 FLR 289, FD

B (A Child), Re [2007] EWCA Civ 1463, (unreported) 20 December 2007, CA

D (A Child) (Abduction: Custody Rights), Re [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, [2007] 1 All ER 783, HL

F (Abduction: Joinder of Child as Party), Re [2007] EWCA Civ 393, [2007] 2 FLR 313, CA

H (Abduction), Re [2006] EWCA Civ 1247, [2007] 1 FLR 242, [2006] All ER (D) 302 (Jul), CA

H (Abduction: Child of 16), Re [2000] 2 FLR 51, FD

J (Child Returned Abroad: Convention Rights), Re [2005] UKHL 40, [2006] 1 AC 80, [2005] 3 WLR 14, [2005] 2 FLR 802, [2005] 3 All ER 291, HL

M (Abduction: Rights of Custody), Re [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 All ER 1157, sub nom *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251, HL

Mabon v Mabon [2005] EWCA Civ 634, [2005] 3 WLR 460, [2005] 2 FLR 1011, CA

N v N (unreported) 25 September 2007, FD; *N, Re* [2007] EWCA Civ 1129, (unreported) 25 October 2007, CA

S (Abduction: Children: Separate Representation), Re [1997] 1 FLR 486, FD

Vigreux v Michel [2006] EWCA Civ 630, [2006] 2 FLR 1180, CA

Zaffino v Zaffino (Abduction: Children's Views) [2005] EWCA Civ 1012, [2006] 1 FLR 410, CA

David Williams for the plaintiff
Teertha Gupta for the defendant
Edward Devereux for the intervenors

Cur adv vult

RYDER J:

The application

[1] This is an application by four children to be joined as parties to Hague Convention (the Hague Convention on the Civil Aspects of International Child Abduction 1980) and inherent jurisdiction proceedings which have been instigated by their father by an originating summons issued on 5 February 2008. Their father's application followed their mother's removal of them from France to the jurisdiction of England and Wales on 30 December 2007.

[2] The plaintiff, MC, is the children's father and he is represented by Mr David Williams. The defendant, SC, is their mother and she is represented by Mr Teertha Gupta. The children are separately represented for the purpose of this hearing by their solicitor Anne-Marie Hutchinson and counsel Mr Edward Devereux. The court wishes to express its gratitude to all involved for the quality of the representation which has been provided.

[3] The children who make this application are:

C (dob 17 February 1992, now aged 16 years)
CO (dob 31 October 1994, now aged 13 years and 3 months)
D (dob 27 July 1996, now aged 11 years and 6 months), and
P (dob 26 July 1998, now aged 9 years and 7 months).

[4] The children have instructed Ms Anne-Marie Hutchinson who, after seeing the children separately on Monday 11 February 2008, has provided an affidavit detailing her instructions from them. She has concluded that: 'All four children are articulate and of an age and maturity when it is appropriate to consider their views. They are able to give instructions and wish to do so'. C has been present in court throughout this hearing and CO and D have both listened to a part, each at their own request. Their father had not given instructions to his lawyers that would enable them to consent to this course, but I took the view after hearing submissions that it was appropriate for the children to know how their application had been determined, whatever the end result. None of the children asked to speak with me directly and in light of the advocacy provided on their behalf I did not offer that opportunity.

[5] The parties have a further child, H, (dob 28 December 2002, now aged 5 years and 1 month), who is included within her father's application for summary return but because of her age and assumed understanding she is not included in the application for separate representation.

The background

[6] The parties married on the 29 August 1992 when C was already 6 months old. During the marriage they lived in W in a property which is still owned by the father. The parties purchased a second property in France, the successor to which is a house in the village of F. In circumstances that are in dispute, the parties moved to France in July 2005 and initially lived together with their children in that property.

[7] The parties' relationship deteriorated and it is apparent from the proceedings of the Tribunal de Grande Instance that Mrs C made an application within that jurisdiction by a request dated 23 November 2006. On 21 December 2006 and at a conciliation hearing that court authorised the

pursuit of a divorce and acknowledged the parties' separation by assigning the French property to mother for her use with the children, granting father one month to relocate. The children's normal residence was declared to be with their mother and, in the absence of agreement, their father was granted staying including holiday visiting rights with them. The parties were to share parental authority and provision was made for maintenance. It is apparent that there were further proceedings in France in February and July 2007 in respect of which I have seen no record but in any event there is as yet no agreement as to the nature and effect of any of the applications and orders that were made in any of the French hearings.

[8] On his own account father left the French property and the jurisdiction of France to live with his parents in Spain in March 2007 only to return to France and rent accommodation near to the family in June 2007. His case is that he went to the family home in France on the 31 December 2007 to exercise contact with the children and found it empty.

[9] The father asserts that at the time of their removal by their mother, the children's habitual residence was in France and that they were wrongfully removed. In her statement of defence the mother asserts that the move to France in 2005 was for a temporary purpose and that the children's habitual residence remained in England and Wales. In addition she asserts that their father abandoned them to go to Spain and exposed them to an intolerable situation which would persist were they to return. She raises Art 13 defences including the objections of each of the children to their return.

[10] As can be seen from the foregoing there is little of novelty having regard to the context of abduction proceedings in the general background to this application even accepting that there are many issues of fact which both parents raise. Almost nothing is now agreed between them. The proceedings have been set down for hearing as near as possible to the time deadline that is prescribed and at the time of handing down this judgment neither party has obtained permission to adduce oral evidence. It remains to be seen whether that will be necessary although sufficient time has been allowed to take account of the possibility that it will, should a judge grant permission for the same.

[11] The one issue that differentiates this application from many others is that C is now 16 and by reason of Art 4, the Convention has ceased to apply to him. This court is not precluded from considering an application by father for his return but that has to be in the exercise of the court's inherent jurisdiction (see *Re H (Abduction: Child of 16)* [2000] 2 FLR 51). On 13 February 2008 C's father confirmed through his counsel that he did indeed seek to pursue his return. As is clear from the affidavit of Ms Hutchinson the children take a joint as well as a several view of these proceedings and there will arise real questions about the different considerations that the court will apply to C in contrast to his younger siblings and the questions of discretion and enforcement that will in any event arise.

Summary of the decision

[12] It is appropriate that the parties and the children should understand the decision I have made before I consider the detailed arguments I have heard. This inevitably involves some consideration of the law but I will be as plain as I am able.

[13] In *Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 All ER 1157, sub nom *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251, Baroness Hale of Richmond set out the test at [57] that is to be used by these courts in Convention proceedings as follows:

> '… the question for the directions judge is whether separate representation of the child will add enough to the court's understanding of the issues that arise under the Hague Convention to justify the intrusion, the expense and the delay that may result.'

[14] In my judgment, that has set the legal policy behind and the terminology of the test that I should apply. It is neither appropriate nor necessary to re-work the test by looking at the many previous legal authorities that there have been on the question. The decision of the House of Lords is, if I may say so, clear and binding on this court.

[15] The position of C is clear. The Convention does not apply to him because of his age and different legal principles will be applied by this court when considering his father's application for him to return. Similarly, the question whether he should be separately represented within these proceedings is answered by the application of a different test from that relating to his brothers and sisters who are subject to the terms of the Convention.

[16] If I consider the test relating to C I have no doubt that it is in his best interests to be a party to these proceedings and that he should be entitled to instruct the solicitor of his own choice. He need not use a litigation friend unless he chooses to do so. When I consider how the case that C wants to put interrelates with the case of his brothers and sisters (and that of each of his parents) I am persuaded that the separate representation of the younger child will add to the court's understanding of the issues that arise under the Hague Convention. There is little expense and delay in the separate representation of CO, D and P having regard to the representation of C, indeed their guardian ad litem could choose to use the same solicitor. As to intrusion, that is the only real argument that father has once the debate about the test to be applied has been resolved. I have considered this very carefully indeed: it is almost always a powerful argument, but on the facts of this case I have decided that it does not outweigh the benefit to be obtained from separate representation.

[17] Accordingly I shall direct that all four children are to be joined as parties and that the three younger children are to be represented by a guardian ad litem (a litigation friend). I shall request that Mr John Mellor at the High Court CAFCASS Unit considers accepting that invitation and the possibility of instructing Ms Hutchinson on behalf of the three younger children so that all might be represented together.

The non-Convention test

[18] It is convenient to deal first with the non-Convention tests. So far as the substantive removal test is concerned, C's circumstances will be considered by reference to welfare not solely by analogy with Convention principles. That much was made plain in *Re J (Child Returned Abroad:*

Convention Rights) [2005] UKHL 40, [2006] 1 AC 80, [2005] 2 FLR 802 and in *Re M (Children) (Abduction)* above at paras [38]–[42] and in particular at para [38]:

> 'this House made clear the approach to be adopted in wrongful removal or retention cases falling outside the Hague Convention. The child's welfare is indeed the paramount consideration. But the court does have the power to order the immediate return of the child to a foreign jurisdiction without conducting a full investigation of the merits'

[19] The procedural test for joinder is that set out in r 9.5 of the Family Proceedings Rules 1991 (SI 1991/1247) (FPR) 1991 which is whether:

> 'it appears to the court that it is in the best interests of any child to be made a party to the proceedings'

[20] The general procedural rule as to representation once a child has been joined is that any child as a person under a disability is to be represented through, ie defend the proceedings by, a guardian ad litem (a litigation friend): r 9.2(1) FPR. By r 9.1(3) an exception to this rule is provided by r 9.2A in respect of inherent jurisdiction proceedings. In particular, by r 9.2A(b) the young person concerned may defend such proceedings without a litigation friend:

> 'where a solicitor—
>
> (i) considers that the minor is able, having regard to his understanding, to give instructions in relation to the proceedings; and
> (ii) has accepted instructions from the minor to act for him in the proceedings and, where the proceedings have begun, is so acting'

[21] The affidavit of Ms Hutchinson satisfies the conditions set out in this exception. It is of course the case that ultimately the court rather than C's solicitor has the right to decide whether if joined he should come before the court without a litigation friend, but I have heard nothing in submissions nor read anything in the evidence that persuades me he should not be permitted to continue to instruct Ms Hutchinson and there is no evidence that he is incapable of understanding the risk of harm from participation directly in the proceedings. The most authoritative review of the law and practice of these courts in non-Convention cases can be found in *Mabon v Mabon* [2005] EWCA Civ 634, [2005] 2 FLR 1011 CA. The relatively strong criticism of the application of its principles to the representation of children in abduction cases must be seen in the context that hitherto the attempts to apply its principles have been to cases where Convention principles apply. It is entirely understandable in that context that, to take just one example, Wall LJ should say in *Re H (Abduction)* [2006] EWCA Civ 1247, [2007] 1 FLR 242 at [25]–[27]:

> 'There are in my judgment, material differences between the question of separate representation for a child in a welfare inquiry and separate representation in summary proceedings under an international convention, where the welfare inquiry is to take place elsewhere. I firmly reject the submission that because in domestic private law applications under the Children Act there may be perceived to be a trend towards the more liberal use of separate representation in cases of particular difficulty, or in relation to older children as a means of ensuring that the voice of the child is heard properly there (see for example *Mabon v Mabon* [2005] EWCA Civ 634, [2005] 2 FLR 1011) it follows that the test for separate representation in cases under the Hague Convention is no longer that of exceptional circumstances.'

[23] The proceedings relating to C may involve an application for summary return but they involve a welfare inquiry within the inherent jurisdiction. At least in summary form and arguably in some more detailed form the welfare inquiry will take place before this court not (just) elsewhere. Accordingly, in my judgment, the principles enunciated in *Mabon* are of direct applicability.
[24] It suffices to summarise the basis of the decision in *Mabon*, namely the growing acknowledgement of the autonomy and consequential rights of children both nationally and internationally (see paras [26] to [32]). At paras [28] and [29] Thorpe LJ said:

> 'Unless we in this jurisdiction are to fall out of step with similar societies as they safeguard Article 12 rights, we must, in the case of articulate teenagers, accept that the right of freedom of expression and participation outweighs the paternalistic judgment of welfare …
>
> In testing the sufficiency of a child's understanding, I would not say that welfare has no place. If direct participation would pose an obvious risk of harm to the child, arising out of the nature of the continuing proceedings and, if the child is incapable of comprehending that risk, then the judge is entitled to find that sufficient understanding has not been demonstrated. But judges have to be equally alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings.'

The Convention test
[25] The test for joinder in Convention cases has most recently been considered in three cases: *Re D (A Child) (Abduction:Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, [2007] 1 FLR 961 (where the child was 8 years old); *Re F (Abduction: Joinder of Child as Party)* [2007] EWCA Civ 393, [2007] 2 FLR 313 (where the child was 7 years old) and *M (Abduction: Rights of Custody), Re* [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 All ER 1157, sub nom *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251 (where the children were 13 years, 10 years and 6 months old). In both *Re D* and *Re M*, the House of Lords allowed the children to be made parties to the proceedings. There has been no reported decision on the point in question since *Re M* although the Court of Appeal has considered and granted an appeal from the decision of Charles J in *Re B (A Child)* [2007] EWCA Civ 1463 (unreported) 20 December 2007, on different grounds and did not criticise his interpretation of

the test. The fact that Charles J handed down judgment immediately before the opinions in *Re M* were delivered and that he affirmed his decision without the need to add any new reasons the day after the opinions were delivered can be seen in the refusal of permission to appeal form that he prepared.

[26] In *Re D* Baroness Hale of Richmond undertook a detailed consideration of the child's position in Hague Convention proceedings (see paras [57] to [62]). She noted that:

> '… there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides.'

[27] She considered Art 11.2 of Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, [BIIR] and having held that the obligation contained within that Article of the Regulation is of universal application, she said at paras [59] to [61] that it followed:

> '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.
>
> There are three ways of doing this. They range from full scale legal representation of the child, through the report of an independent CAFCASS officer or other professional, to a face to face interview with the judge. In some European countries, notably Germany, it is taken for granted that the judge will see the child. In this country, this used to be the practice under the old wardship system, but fell into disuse with the advent of professional court welfare officers who are more used to communicating with children than many judges. The most common method is therefore an interview with a CAFCASS officer, who is not only skilled and experienced in talking with children but also, if practising in the High Court, aware of the limited compass within which the child's views are relevant in Hague Convention cases. In most cases, this should be enough. In others, and especially when the child has asked to see the judge, it may also be necessary for the judge to hear the child. Only in a few cases will full scale legal representation be necessary. But whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented.
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> Hitherto, our courts have only allowed separate representation in exceptional circumstances. And recently in *In Re H (A Child)* [2006]

> EWCA Civ 1247, [2007] 1 FLR 242 the view expressed in the Court of Appeal, that if the test for party status were to be revised in any direction, it should in future be more rather than less stringently applied. But the Brussels II Revised Regulation requires us to look at the question of hearing children's views afresh. Rather than the issue coming up at a late stage in the proceedings, as has tended to take place up to now, European cases require the court to address at the outset whether and how the child is to be given the opportunity of being heard. If the options are canvassed then and there and appropriate directions given, this should not be an instrument of delay. CAFCASS officers and, in the few cases where this is appropriate, children's representatives are just as capable of moving quickly if they have to do so as anyone else. The vice has been when children's views have been raised very late in the day and seen as a "last ditch stand" on the part of the abducting parent. This is not the place they should take in the proceedings. There is no reason why the approach which should be adopted in European cases should not also be adopted in others. The more uniform the practice, the better.'

[28] In *Re F (Abduction: Joinder of Child as Party)*, which followed *Re D* but which was before *Re M*, the Court of Appeal considered the effect of that passage when adjudicating upon an application by a child to join Hague Convention and BIIR proceedings. It was submitted to the Court of Appeal that her Ladyship's words in *Re D* 'lowered the bar in favour of the applicant' who sought party status (see para [6]). Thorpe LJ rejected that submission and in his consideration of whether the child should be made a party by reference to whether the circumstances could be said to be 'sufficiently exceptional' he concluded at para [7] that:

> 'the bar essentially remains where it was. I do not take the descriptive sentences at the end of para [60] as having the effect of lowering the bar.'

[29] I am told and it has been demonstrated to this court without contradiction that the observations of the Court of Appeal in *Re F* were specifically addressed to the House of Lords in the children's printed case. In her opinion at para [57] in *Re M* Baroness Hale of Richmond said:

> 'I would finally comment that "exceptional" or not, this is a highly unusual case. Cases under the second paragraph of Article 12 are in any event few and far between. They are the most "childcentric" of all child abduction cases and are very likely to be combined with the child's objections. As pointed out in *Re D*, it is for the court to consider at the outset how best to give effect to the obligation to hear the child's views. We are told that this is now routinely done through the specialist CAFCASS officers at the Royal Courts of Justice. I accept entirely that children must not be given an exaggerated impression of the relevance and importance of their views in child abduction cases. To order separate representation in all cases, even in all child's objections cases, might be to send them the wrong messages. But it would not send the

> wrong messages in the very small number of cases where settlement is argued under the second paragraph of Article 12. These are the cases in which the separate point of view of the children is particularly important and should not be lost in the competing claims of the adults. If this were to become routine there would be no additional delay. In all other cases, the question for the directions judge is whether separate representation of the child will add enough to the court's understanding of the issues that arise under the Hague Convention to justify the intrusion, the expense and the delay that may result. I have no difficulty in predicting that in the general run of cases it will not. But I would hesitate to use the word "exceptional". The substance is what counts, not the label.'

[30] It has to be acknowledged that the formulation of the principles to be applied as described by the House of Lords is intended to and does enable these courts to comply with our international obligations. In particular, the direct applicability of Art 11.2 of BIIR, Arts 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and Art 12 of the United Nations Convention on the Rights of the Child 1989.

[31] In summary, therefore, the 'exceptional circumstances test' for the joinder of children in Hague Convention proceedings, most recently enunciated by the Court of Appeal in *Re F*, has been authoritatively considered by the House of Lords in *Re M*. The test for party status in Hague Convention proceedings has been re-considered and re-stated by the House. The proper test for the court in considering this application is 'whether the separate representation of the child will add enough to the court's understanding of the issues that arise under the Hague Convention to justify the intrusion and the expense and delay that may result.'

[32] Insofar as it said on father's behalf that the Court of Appeal did not comment adversely on the analysis of Charles J in *Re B* it can legitimately be said that Charles J helpfully drew upon the decision of Wall J (as he then was) in *Re S (Abduction: Children: Separate Representation)* [1997] 1 FLR 486 to elaborate examples of what can now be described as the first limb of the *Re M* test. In *Re S* Wall J set out a number of factors which might justify separate representation. These included:

(i) Where there is no parent who can represent the child's views
(ii) Where the situation the child faces on a return is particularly complex – for instance where he would return not to the care of the left behind parent
(iii) Where the abducting parents previous conduct might prejudice the hearing of the child's views from that parent
(iv) Where the child may have views of or give evidence in conflict with the abducting parent
(v) Where due to the nature of the underlying factual background the child might feel a real sense of grievance if they were returned without their independent voice being heard and without the opportunity to put their case independently of the abducting parent

(vi) Where the child may wish to advance a 'defence' not advanced by the abducting parent.
(vii) Where the case is complex and finely balanced.

[33] With respect to Mr Williams' careful submissions, an analysis of these factors in the context of the facts of this case and/or of the first limb of the *Re M* test only tends to give weight to the children's case for separate representation. While I accept that *Re M* and *Re D* represent an evolutionary development of a legal policy relating to the representation of children, I do not accept that it is helpful to re-cast the *Re M* test in terms or language reminiscent of the previous authorities and I decline to do so.

[34] Although they are not an aid to judicial interpretation, there are extra judicial materials that support the legal policy enunciated by Baroness Hale of Richmond in *Re M*, for example:

(i) The explanatory report of Professor Elisa Perez-Vera concerning the 1980 Hague Convention specifically refers at para [78] to 'children under sixteen who have the right to choose their own place of residence'. The child's objections defence in the second part of Art 13 is analysed in this paragraph of the report as follows: 'this rule leaves it open to judicial or administrational authorities' as to whether a non-return of a child because s/he objects confers such a legal entitlement to choose his or her own place of residence.
(ii) At para [24] of the same Report Professor Perez-Vera repeats the phrase first coined by the Parliamentary Assembly of the Council of Europe on 4 October 1979 namely that 'Children must no longer be regarded as their parents' property but must be recognised as individuals with their own rights and needs'.
(iii) The speech of the President of the Family Division to the 17th World Congress of the International Association of Youth and Family Judges and Magistrates on the 28 August 2006 at para [3] p 5 and the speech of Wilson LJ on the occasion of the Hershman/Levy Memorial Lecture on the 28 June 2007 entitled 'The Ears of the Child in Family Proceedings'.
(iv) Finally, (but not exhaustively) as reported in November [2007] IFL 171 Baroness Hale of Richmond extensively reviewed the representation of children in an article entitled 'The Voice of the Child' derived from an address to the International Society of Family Law in July 2007.

[35] I have heard and read erudite submissions to the effect that I should re-interpret *Re M* by reference to previous and subsequent decisions of their Lordships' House, the Court of Appeal and my brother judges in this Division. So far as I can ascertain all of the principles relied upon before me were put before the House when it heard *Re M*. Insofar as lawyers can always find a point of distinction or alternative constructions to be placed on the same words and how those words are to be applied, that is of course one of their functions and different circumstances may yet give rise to very different conclusions on the facts of particular cases. What is not in doubt, in my

judgment, is that the *legal policy* that balances the purposes of the Convention and the interests or rights of those affected and which governs this court has been clearly stated and reduced into the form of a test. It is for this court to apply that test without gloss. If others disagree it is for them to say with clarity why a plain and purposive approach to the test should differ from the words used by Baroness Hale of Richmond.

[36] Likewise the test to be applied in relation to C in the inherent jurisdiction is clear. I cannot accept the effect of the submissions made on father's behalf which would elide Convention and non-Convention principles simply because father seeks the return of an older child who was formally subject to the Convention but is no longer. There would be no purpose or effect to Art 4 were that to be the case and all children and young people would by an extension of logic face the same test on a return application regardless of the jurisdiction to be applied.

Application of the tests

[37] The position of C is highly unusual, if not unique at least so far as the reported jurisprudence is concerned. There is, so far as is known, no reported case on an enforced return of an articulate, mature and intelligent (or indeed any) 16-year-old child by the exercise of the court's inherent jurisdiction. Entirely different and, very importantly, welfare considerations will apply to the court's consideration of C as a result of the application being made under the inherent jurisdiction rather within the more restrictive confines of the Hague Convention. These welfare considerations cannot (and it is going to be argued should not) be properly put by the mother whose evidence at least so far as the younger four children are concerned must be focused on, and limited by the Articles of the Convention and the procedural practice of the court in Convention proceedings.

[38] C's views as to his interests and especially his beliefs as to the expected duration of any stay in France, how his educational and other interests are best met and the impact of any separation from his siblings are apparently rationally and strongly held. If either his father invites the court to split his siblings from him for the first time in their lives or the court determines that it has to seriously consider that option, there would on any basis be a strong welfare argument that C should be allowed to present in reply. For the court to determine that it is not in his best interests for him to become separately represented would be an extraordinarily paternalistic and, it has been argued, destabilising approach to adopt. In his case the dicta of Baroness Hale of Richmond in *Re D* at para [52] are apposite:

> 'No-one intended that an instrument designed to secure the protection of the children from the harmful effects of international child abduction should itself be turned into an instrument of harm.'

[39] The children, CO, D and P, are able to put distinctive submissions and defences relating to their father's originating summons under the Hague Convention from those put by their mother: (a) as to the issue of their habitual residence, and (b) as to an Art 13(b) defence derived from the potential separation of the siblings (which is not, so far as the mother's defence shows, being actively pursued by the mother or if it were to be, may be diluted in its

force by the fact that it is the mother who raises it). Indeed, the children should be entitled to pass independent, critical or other comment on the mother's actions.

[40] As to the argument that the children can retain and/or have a separate habitual residence despite the actions of their parents, that does not easily fall to be developed in the proceedings by the children's mother. It may be submitted on behalf of the children in due course that analogous to the first paragraph of Art 10 of BIIR, where an abducted child acquires habitual residence in a foreign country independent of his parents' consent, these children have not lost their English habitual residence. Article 10 of BIIR begins with these words:

> 'In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State …'

[41] The logic of this argument was accepted by Singer J in *Re A; HA v MB (Brussels II Revised: Article 11(7) Application)* [2007] EWHC 2016, [2008] 1 FLR 289 at para [84]. In *N v N* (unreported) 25 September 2007, McFarlane J considered the example of unaccompanied and trafficked children in a South African case. His decision was affirmed by the Court of Appeal (in *Re N* [2007] EWCA Civ 1129, (unreported) 25 October 2007) and the 13-year-old child concerned was allowed to be represented in both courts. At paras [51] to [55] he said:

> '51 There is no authority on the question of whether a child can unilaterally change habitual residence or if there is, the Court is unaware of it. The argument developed by Mr Gupta, it has to be said with the Court's encouragement, ran along lines starting with the House of Lords decision in the Gillick case and contemplating that if a young person is competent in areas of their lives, one area of life in which they may become competent is in relation to habitual residence.
> 52 For the father it is said that such a concept would drive a coach and horses through the child abduction structure and that children arriving at airports simply saying they did not want to go back, would be said to change their habitual residence. There may be some cases where that is indeed open to a child to do, and D has as a feature of her history some facets which lend support to the argument that she has been far more independent of her parents' day-to-day care than most children, living as she did with other relatives or at boarding school, and at arm's length from her parents for much of her life.
> 53 But her care has been organised by her parents and family, she has an age of maturity, which I will return to, to entitle this Court to consider her objections and wishes and feelings but these matters have to be looked at on a sliding scale or a spectrum, and simply having maturity does not mean that a young person is thereby competent, if that is at all a proper phrase to use, to make a decision as to habitual residence.

> 54 Her main driving motive in what she says is to be with her mother. She told the CAFCASS officer it did not matter which country she was in, the important thing was to be with her mother and that is understandable and it is not driven by any contemplation at the forefront of her mind of different states and countries and jurisdictions.
> 55 I therefore find that if it is legally possible to contemplate a child or young person unilaterally changing their own habitual residence, the evidence in this case does not get D anywhere near to that level.'

[42] Likewise it is submitted that in a forced marriage case a child who has been forcibly taken abroad by both parents is able to issue proceedings by way of a litigation friend in this jurisdiction in order to retain his/her habitual residence against the parents' wishes.

[43] Accordingly, it is submitted and I accept that the separate representation of the three younger children will add to the court's understanding of the issues. But what as to the intrusion that such an involvement will have on the lives of each of those children?

[44] It is persuasively argued before me that it would be emotionally harmful for the court not to empower these children not only to put their views before the court but also to have them properly, independently and specifically, advocated. However expert any CAFCASS officer may be in obtaining a child's views, much will depend on the way that that officer elicits those views ie what questions he asks and how he interprets the answers. That officer is not able to advocate a child's views within the proceedings and in particular to respond to the evidence and submissions as they unfold, giving the child's position where appropriate. The process of reporting does not allow a child to engage in the proceedings. It would also be emotionally harmful for any one of the older children, given their closeness in age, to be refused permission to be separately represented where another is permitted to be so. For this court, that is a decisive factor having regard to the closeness of these children and the decision that I have already made in respect of C.

[45] Finally, if the 'gateway' stage of the children's objections exception is passed, the court must consider the discretion stage. It is argued that *Re M* marks a change so that the return 'policy' of the Convention is a much less potent factor to be considered at this stage (see *Zaffino v Zaffino (Abduction: Children's Views)* [2005] EWCA Civ 1012, [2006] 1 FLR 410 and *Vigreux v Michel* [2005] EWCA Civ 630, [2006] 2 FLR 1180). Welfare considerations including having regard to the children's views will now loom larger.

[46] This is a rare case where a number of relatively old, articulate, close in age, children all vigorously and apparently rationally object to a return to France. Their views are almost *ad idem*, although they are of different ages. This is not a case where the children are unaware of the issues or of their parents' very different stances. Accordingly this is also not a case where the children will be exposed by the proceedings to issues with which they have not previously been involved and to that extent arguably already harmed. By the nature of their ages and understanding and the events that have happened ie facts that have affected them as distinct from events that have yet to occur, the substance of the issues in these proceedings have already well and truly intruded into their lives. It is difficult to see how their involvement in the proceedings to have advocated that which they already very firmly express

can be any more intrusive or harmful for them. The very partiality of their position and their parents' positions will cause them harm, not their involvement as parties to the proceedings. They already oppose their father and not having the opportunity to say what they think and why they think it is more likely, in my judgment, to cause them harm than allowing them to express their views and wishes and to have their positions advocated professionally by their lawyers.

[47] This application has been made extremely promptly. No delay, or at least minimal delay as to the listing of the final hearing will result from the granting of the application. In the context of C being separately represented there are only minimal expense considerations for his siblings to be provided with the same service.

[48] In all the circumstances I have come to the conclusion that CO, D and P should also be joined. Having regard to the rules they should be represented by a guardian ad litem and it is appropriate that the same practice be adopted in Convention cases as in private law proceedings under the Children Act 1989, namely that an invitation should first be made to the specialist unit at CAFCASS and to Mr Mellor at that office. I would recommend that he considers the instruction of Ms Hutchinson for all of the children.

[49] I have not committed to paper in this judgment a parallel exercise involving the application of the 'exceptionality' test to the facts of the case. I have in fact considered the older authorities and the effect of the matters set out from para [37] above in that context. If asked, I would be minded to conclude that in respect of any and all of the children that test would have been satisfied on the facts of this case and accordingly I would have permitted the children's separate representation on that basis.

Order accordingly.

Solicitors: *Davies, Gore Lomax* for the plaintiff
Freemans for the defendant
Dawson Cornwall for the intervenors

PHILIPPA JOHNSON
Law Reporter