England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2013] EWCA Civ 1058
Case No: B4/2013/1609

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT FAMILY DIVISION
MR JUSTICE COBB
FD13P00122

Royal Courts of Justice
Strand, London, WC2A 2LL
15/08/2013

B e f o r e :

LADY JUSTICE HALLETT
LADY JUSTICE BLACK
and
LADY JUSTICE GLOSTER

Between:
LC (CHILDREN)

Mr Frank Feehan QC & Mr Christopher Hames (instructed by Goodman Ray) for the Appellant
Mr Henry Setright QC & Mr Edward Devereux (instructed by Dawson Cornwell) for the 1st Respondent
Mr David Williams QC & Miss Jacqueline Renton (instructed by The International Family Law Group LLP) for the 2nd Respondent
Mr Teertha Gupta QC & Mr Michael Edwards (instructed by Freemans Solicitors) for the 3rd & 4th Respondents
Hearing dates : Thursday 1st August 2013

HTML VERSION OF JUDGMENT

LADY JUSTICE BLACK:

1. This litigation arises from proceedings under the Child Abduction and Custody Act 1985 for the return of four children to the Kingdom of Spain pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980.

2. The eldest child is a girl, T, who was born on 27 August 2000 and is nearly 13 years old. She has three brothers: L was born on 4 December 2002 and is 10, A was born on 2 December 2004 and is 8, and N was born on 29 December 2008 and is 4. They are all Spanish nationals.

3. The applicant for the return of the children was their mother (M). She is a Spanish national, now living in Spain. Their father (F), who is a British national and lives in England, resisted the making of an order.

4. Cobb J determined the application on 23 May 2013. He found that the children were habitually resident in Spain on 5 January 2013 and that they had been wrongfully retained in this country by F. He found that the oldest child, T, objected to being returned to Spain and was of sufficient age and maturity for her views to be taken into account but he nonetheless determined that she should be returned. As for the boys, it was argued that the older two also objected to being returned but Cobb J did not accept that and he was therefore obliged to order the return all three boys, which he did. It is from these orders for the return of the children that F seeks to appeal. As will become apparent later, however, F was not the only protagonist in the appeal proceedings.

5. Cobb J's judgment is available on bailii.org.uk, reported as LCG v RL [2013] EWHC 1383 (Fam). It is not therefore necessary for me to repeat all the factual details in this judgment. I will confine myself to that which is sufficient to explain what was argued before us and what I would decide.

6. The parents never married. Because of this, F has no parental responsibility for the older two children. However, he does have parental responsibility for the younger two by virtue of his name being recorded on their birth certificates. In practice, all four children have always been treated in the same way within the family and no one sought to argue that the difference in respect of parental responsibility made any difference to the outcome of M's Hague applications.

7. The parents met in England and lived in this country throughout their relationship. M used to take the children to Spain, without F, during the summer for a holiday and to see her family there but until summer 2012 England was always the family's home.

8. The parents' relationship has been turbulent for a long time. Things became particularly difficult in 2011 and the relationship finally disintegrated in early 2012. There were constant arguments and the children were becoming increasingly disturbed by the home situation. On F's case, T aligned herself with M against him. There were a number of discussions between the parents over the early months of 2012 about the longer term future.

9. On 6 June 2012, M bought one way tickets to Spain for herself and the children. She gave notice that the children were leaving their schools and cancelled hobbies such as L's cubs. On 24 July 2012, F took M and the children to the airport from where they flew to Spain.

10. M and the children moved in with the maternal grandmother in Spain, their rooms there being redecorated and furnished to their taste and needs. They started school in Spain. F accepted that they had done reasonably well there. The children made friends.

11. F visited them in Spain in November 2012. It was agreed that the children would spend Christmas with him in England. He flew out to Spain and on 23 December 2012 he brought them back to this jurisdiction. They were to return to Spain on 5 January 2013, F's intention (at least at the date when he collected them) being that they would resume their life and school there. However, shortly before 5 January 2013, the children indicated that they did not wish to return to Spain. On F's case, they (possibly only L and A) hid their passports in an attempt to frustrate their departure. They were not returned.

12. On 10 January 2013, F told M that he had begun proceedings in England to secure protective orders here. On 21 January 2013, M made her Hague Convention application for the children's return to Spain.

The form of the hearing

13. In what was an unusually protracted hearing for a Hague case, which lasted three days excluding judgment, the judge heard oral evidence from both of the parents and also from Ms Vivian, a CAFCASS officer who had prepared a report dated 28 February 2013 in relation to the children's wishes and feelings, their objections (if any) to a return to Spain and their maturity, and a later addendum dated 7 May 2013 addressing particular questions that had arisen. He gave a reserved judgment a short time after the conclusion of the hearing.

The position of the children

14. The children were not parties to the proceedings in front of Cobb J.

15. An application was made to Cobb J on 12 April 2013 by F for T to be joined as a party so that she might be separately represented. The application was made on the basis that if joined, T would have the benefit of a children's guardian. The reasons put forward in support of the application were, in broad summary, that T was mature enough to be a party, that she had a strong view that she did not want to return to Spain, that she needed to be able to refute M's allegation that a material email purporting to come from T was influenced by F or written by him, and that she had a standpoint or interest which was inconsistent with that of the adult parties and could not be represented by them. Furthermore, it was suggested that she might have a different perspective on the issue of habitual residence from that advanced by F.

16. Cobb J refused to join T as a party. He said that he had to balance the need to "respect the autonomy of a mature child, who clearly expresses her wishes forcefully and intelligently to a CAFCASS officer, against the desirability of shielding such a child from the court process of which she is subject" (§12, 12 April 2013 judgment). He took the view that although confident and intelligent, at 12 T is still "but a girl". The strength of her wishes and feelings were already fully and vividly reported by the CAFCASS officer and Cobb J ordered that that officer prepare an addendum report. This was to provide an updated view as to the children's wishes and feelings and the officer was to discuss with T the provenance and authorship of the disputed email and was to consider the specific question of parental influence on any of the children. Cobb J took the view that the officer would do no more as a guardian than she would in this continued role as the author of a report and that T's best interests would not be in any sense compromised by his refusal to join her as a party.

17. As to the possibility that T may have a different perspective on habitual residence, Cobb J said there was no evidence to support that argument and considered that it would not be proper to join a child to the proceedings "on what is essentially a purely speculative possibility that T, through lawyers, would have a different perspective on a point of mixed law and fact (albeit heavily law dependent), particularly given that F … is represented by experienced and specialist solicitors and counsel".

18. That was where the question of any of the children being parties rested. F did not seek to appeal against Cobb J's refusal of 12 April 2013 to join T as a party. T did not seek to instruct solicitors to make a further application to the judge on her behalf. As for the boys, no application was ever made by anyone for any of them to be joined.

19. The experience of the three day substantive hearing led Cobb J to make some important observations at the end of his judgment of 23 May 2013. He commented on how bruising the litigation had been for the parents and asked them to think over how much worse it had been for the children. He said:

> "115. T in particular has become directly involved in the proceedings – perhaps naturally given her age and her inquisitive mind. Ms Vivian left me in no doubt that it had been counter-productive to have had to interview the children for a second time (pursuant to my own direction, I recognise, albeit at the request of the parties); they did not want it and she felt that it had not been truly necessary. Mercifully T was not more closely embroiled, as had been the father's hope at the PTR when, through counsel, he made an application for her to be joined as a party." [incorporating a minor correction by me]

20. Sadly, however, T became very much more closely embroiled in the litigation following the conclusion of the proceedings before Cobb J. She instructed her own solicitor and in due course acquired leading and junior counsel. L and A (10 and 8 years old) together instructed another solicitor and leading and junior counsel represented the pair of them. The two solicitors were confident that the children instructing them had sufficient understanding to do so and to do so without the assistance of a guardian.

21. Fortunately for L and A, they decided not to come to the appeal hearing but T was in attendance in court throughout. I am entirely sympathetic to her wish to hear the detail of the proceedings and to participate directly in them, which she did with dignity, but I could not help but wonder about the impact that the process may have had upon her already fragile relationships within her family. It would be hard to find a clearer practical demonstration of the almost insoluble tension between the objectives of, on the one hand, respecting the autonomy of a child with developing maturity and strong wishes and, on the other, shielding the child from the potentially damaging effects of court proceedings between her parents over her future.

22. How the children came to be active participants in the proceedings in this way needs a little unravelling.

23. L and A applied to the Court of Appeal on 26 June 2013 for permission to view the papers in the case. T made a similar application on 1 July 2013, also seeking leave to intervene in the appeal. These applications were refused on paper by Thorpe LJ on 3 July 2013. T renewed her application orally to Ryder LJ on 9 July 2013 and was joined as a party to the appeal, disclosure of the papers to her solicitors being directed. Only a note of Ryder LJ's reasons for his order is available so it is not possible to be entirely confident of what he had in mind. However, I have no doubt that he was influenced in the course he took by the fact that the appeal was due to be heard by the full Court of Appeal the next day, on 10 July 2013. From the note, it looks as if he was intent on ensuring that T had the opportunity to seek the full court's permission to appeal Cobb J's order in her own right and that the court was likewise able to have the benefit of T's arguments if it thought that appropriate.

24. In fact, the 10 July hearing was adjourned for mediation to take place. Mediation having quickly foundered, on 19 July 2013, L and A requested an oral hearing of their application to see the papers, adding to it an application to be permitted to intervene in the appeal.

25. The oral hearing took place on 25 July 2013 in front of Ryder LJ with leading and junior counsel for L and A in attendance. Ryder LJ seems to have been short of significant information and counsel had not yet had access to the papers so were not able to assist. First, he seems to have been under the impression (as I think he was also on 9 July) that F had already been granted permission to appeal against Cobb J's order when this was not in fact so. Secondly, it seems likely that he did not know what, if any, applications had been made in front of Cobb J with a view to the children being joined as parties. Thirdly, and very importantly, he does not seem to have had a copy of the judgment which Cobb J gave in April on the subject or even a note of the judgment.

26. The upshot of the hearing in front of Ryder LJ was that L and A were joined as respondents to the appeal and were given permission to appeal on the ground that they "should have been granted party status and/or further or better representation in the first instance proceedings before Mr Justice Cobb". Although T was not represented at the hearing on 25 July, she was given permission to appeal in similar terms, it would seem of the judge's own motion. Indeed, as I understand it, none of the children had actively sought to pursue an appeal in respect of Cobb J's failure to join them as parties; this was an avenue apparently suggested by Ryder LJ.

27. As for the grounds of appeal that *were* by now set out in two sets of draft grounds of appeal, one for T and one for L and A, Ryder LJ adjourned the question of whether the children should be permitted to pursue these for determination by the full court, sitting on 1 August 2013, that is to say, by us.

28. Now that we have the advantage of fuller information about the circumstances of the case, an appeal by the children against the refusal/failure of Cobb J to join them as parties looks less attractive than was probably the case on 25 July. It seems likely that, being under the impression that F had already been given permission to pursue his appeal, Ryder LJ would have thought that he was simply granting permission for an extra ground of appeal to be pursued by additional parties at the scheduled hearing of a full appeal. In fact, his order could have resulted in the children's appeal on this point being the only appeal before the court.

29. Perhaps more fundamentally, the cogency of the reasons given by Cobb J for refusing to join T as a party to the proceedings presents a considerable obstacle to any successful appeal against his decision in that respect. There is no doubt that, had Ryder LJ had the benefit of Cobb J's April judgment, he would have wished to give full weight to his reasoning and would have wanted to reflect upon whether, in the light of it, permission to appeal was appropriate.

30. Furthermore, there is the question of who would be the proper appellant(s) in relation to a failure to join the children as parties. The application to Cobb J in relation to T's joinder had not been made by T but by F and, if Cobb J's decision was to be challenged, F would normally have been the proper appellant. Had he been intent on pursuing this, he would have needed to do so expeditiously after the decision of 12 April 2013. His appeal may even have been determined in time for T to be joined in the May hearing before Cobb J if he had been successful. By now, the time for him to appeal the 12 April 2013 order is long past and anyway he does not seek to do so.

31. As for T herself, she could, of course, have sought to pursue party status by making an application through her own solicitors to Cobb J when F's application failed. If the judge had refused, that would have provided her with an avenue of appeal to this court against that decision, subject to obtaining

permission which might have been difficult given that Cobb J's reasons would no doubt have reflected what he had already said on the subject in his April judgment. It may well be that the realisation that she strongly wished to be represented separately only came to T after the judge had made his decision to return all the children to Spain. That is understandable but I wonder (although I do not decide) what status she has in those circumstances to appeal the failure of Cobb J to join her, given that she made no such application during the currency of the proceedings before him.

32. It appears that T's lawyers did not consider it necessary to tangle with these potential difficulties because they did not propose to seek permission to appeal that aspect of the case anyway. T had taken her joinder as a party in the appeal, on 9 July, as providing the opportunity that she never had in the court below to advance her arguments. She was content with that and was apparently surprised to learn that she had been given permission to appeal the refusal to join her in the first instance proceedings.

33. As for L and A, it is considerably more difficult to criticise Cobb J for failing to join them as parties because of their ages and the fact that the judge had never even been asked to consider joining them. A preliminary question arises as to locus to appeal in respect of this alleged failure. At a pinch, F may have included the failure of the judge to join L and A of his own motion as one of his appeal grounds but I am very doubtful that L and A themselves were in any position to appeal about it at all. Even if that were to be overcome, Mr Gupta QC, leading counsel for L and A, freely acknowledged the difficulty in seeking to criticise the judge for failing to do something he had not been asked to do, although he advanced reasons in his skeleton argument why the children should have been joined. I think we can be confident that had the application been made, Cobb J would have refused it for similar reasons to those that he gave in relation to T's application, no doubt all the stronger given the boys' ages.

34. I have analysed the question of joinder of the children as parties at first instance at some length but I think it is fair to say that neither T's counsel nor L and A's pursued this ground of appeal with any real enthusiasm. We considered determining it first, before hearing the rest of the appeal. This would have had some attraction given that it was the only ground of appeal for which permission had been granted. Had we done so and found ourselves not convinced that Cobb J had erred in any way, we may have been inclined to discharge the children as parties to the appeal on the basis that there was no reason for them to be in a different position here from that in which they found themselves in the court below. However, we did not force the issue and to some extent it became academic because the children remained parties to the appeal and their counsel were able to advance all their substantive arguments anyway.

35. Nonetheless, I propose to determine whether Cobb J was wrong in his approach to the joinder of the children.

36. I do not in any way seek to diminish the importance of allowing children of a proper age and maturity to participate appropriately in proceedings which affect them fundamentally nor do I undervalue the legitimate interest of these particular children in these proceedings. On the other hand, welfare considerations are by no means out of place in the court's consideration of whether they should be joined.

37. Cobb J's balancing of the various factors in his April 2012 judgment was, it seems to me, unassailable. T's views about matters were very clear indeed from the CAFCASS report and would be even clearer still once she was seen again by Ms Vivian. Furthermore, the judge was entitled to take the view that, in the circumstances of this case, F could be expected to put forward a comprehensive set of

arguments in favour of the results that T wished to achieve. Indeed, we can see from the skeleton argument prepared just prior to the final hearing by Mr Hames on F's behalf that he did so. Before us, the focus of attention in relation to T's separate point of view has been on the impact that her views about the move to Spain and her stay there have upon the determination of her habitual residence. We can see in Mr Hames' skeleton argument precisely the sort of points that T would no doubt have urged on the court below had she been a separate party. It included, for example:

> i) a denial that T was fully aware there was to be a permanent move (§31) or was consulted (§44);
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> ii) a denial that there was a farewell party (§31);
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> iii) reference to the children's descriptions to Ms Vivian of their lives in Spain which are said not to show the necessary integration to enable a finding of habitual residence to be made (§35);
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> iv) the assertion that the children never settled in Spain and that they clearly consider England to have been their home throughout (§35);
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> v) the assertion that the children were very unhappy in Spain and spoke of being neglected there (§54); and
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> vi) reliance on T's email as reflecting her wishes and feelings (§48).

38. It follows that I would dismiss T's appeal in relation to Cobb J's failure to join her as a party in April 2013. In so far as she would argue that he should have joined her later of his own motion, I am not persuaded by that. For the most part, it is expected that the parties (or those who seek to intervene) will make application to the judge for such an order if it is thought desirable. In so far as it falls to the judge to provoke the issue if no application is made, I cannot see that anything arose in this case to require that. Our attention has not been invited to anything in the developing circumstances after 12 April judgment that ought to have caused the judge to review his decision. If anything, the reverse was true in that the CAFCASS officer made it clear in her addendum report that she found it regrettable that the children had even had to be interviewed again (Trial Bundle D32).

39. As for the boys, given their ages and the fact that there had been no suggestion from anyone that they be joined as parties, I think it is impossible to criticise the judge for failing to do so and I would dismiss the boys' appeal about this as well.

40. Where does that leave the children in relation to the appeal? The position is not without difficulty in my view. Whilst technically possible, joining children who were rightly not parties in the court below as parties to an appeal obviously needs careful thought. Here, no constraint was placed on the children's participation and they took it as the opportunity to file full skeleton arguments on all the issues that arose. Naturally the arguments emerged in slightly different form in each skeleton argument and in the oral advocacy at the appeal hearing, and of course the individual contributions were all of the highest quality and we considered them carefully. However, I think it is fair to say that it would have been possible for everything to be aired fully had we simply heard from those representing F and M. I fear that there are times when duplication of effort serves to obfuscate rather than to clarify. Arguments become confused by repetition. Furthermore, multiple representation meant that it was difficult to get through the argument comfortably in the one day allotted, just as Thorpe LJ had forecast when he refused to join the children at the beginning of July.

Permission to F to appeal

41. Before proceeding to consider the balance of the appeal, I should indicate that I would give permission to F to pursue all his grounds of appeal. My reasons for doing so will appear from what follows.

In the matter of Re B [2013] UKSC 33

42. Cobb J made a number of different decisions in this case, leaving to one side the question of joinder of the children as parties.

> i) He found that the children's habitual residence was in Spain.
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> ii) He found that T objected to returning there.
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> iii) He decided that T should return to Spain notwithstanding her objections.
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> iv) He found that the boys had a preference not to return to Spain rather than having objections to doing so, so he was obliged to return them there.

There was no dispute that the retention of the children in England on 5 January 2013 was wrongful if habitual residence in Spain was found so he did not need to make any decision about that.

43. There was agreement between the parties that following *Re B* [2013] the test we should apply in considering each of the decisions that Cobb J took was whether he was "wrong".

Habitual residence

44. F's grounds of appeal succinctly encapsulate the arguments advanced in relation to habitual residence on behalf of F, T, L and A. They are as follows:

> "1. The Learned Judge wrongly held that all 4 children were habitually resident in Spain against the weight of the evidence. The Appellant had, contrary to the Learned Judge's finding, not agreed to a change of their habitual residence from England to Spain. The children had not integrated into their new environment in the 3 ½ months or less that they had been in Spain after their summer holiday there. The Learned Judge wrongly found that the children had been told they were moving to Spain. He failed to give all due and necessary weight to the clear evidence of the children that they did not consider Spain to be their home. [see in particular: *Mercredi v Chaffe* (Case C-497/10 [2011] 1 FLR 1293].
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> 2. Further or alternatively the Judge failed, given their age and understanding, to accord sufficient weight to the right of the children, or any of them, to choose their own habitual residence as being in the UK. [see in particular: *Gillick v West Norfolk AHA* [1986] 1 FLR 224; *Mabon v Mabon* [2005] 2 FLR 1011; *Sheffield CC v Bradford MBC* [2013] 1 FLR 1027; *Re C (Abduction: Residence and Contact)* [2006] 2 FLR 277]."

45. It was submitted that the communications between the parents preceding the departure in July were ambiguous and that the evidence could not establish that F clearly and unconditionally agreed to a change of residence to Spain for the children.

46. The details of Cobb J's findings of fact in relation to the period up to 24 July 2012 can be found in his §40. He concluded that M had told F seriously that she wanted to move to Spain permanently with the

children and saw that as the start of a new life. He found that F hoped that by letting her go, she might come round to love him again and so reluctantly agreed she could go to Spain with the children indefinitely. The judge found that when they left England, F genuinely did not know when he would see them again and did not expect them to return as usual at the end of the summer holidays. At §41 Cobb J set out his findings in relation to the events following 24 July 2012 which he considered consistent with F having agreed to an indefinite arrangement. These included that he did not object to the children being in Spain or ask M to bring them back, that he invited M in October 2012 to return to England briefly to collect some of her own and the children's belongings and, most significantly, that he genuinely intended to return the children after the Christmas holiday "to live" in Spain.

47. The judge had the benefit of hearing both parents give oral evidence which enabled him to assess their cases. He was able to rely on aspects of F's conduct which supported the finding he made about F's agreement to the move, for example his intention to take the children back for the start of term in January 2013. There was also documentation, such as the email to cubs about L (see §19 of the judgment) which F had read and forwarded for M, which tended to support his acceptance of the move. It is immensely difficult to appeal against findings of fact made in these circumstances, as *Re B* has recently reminded us.

48. It was not argued that the indefinite nature of the arrangement to which F had agreed prevented his agreement being significant for habitual residence purposes. The argument was that the evidence did not support the existence of a clear unconditional agreement to an indefinite move. In my view, it did and the judge was not wrong in this finding.

49. The judge took the view that the European test in relation to habitual residence (as to which he relied on *Mercredi v Chaffe*, see above) and the English test were broadly consistent.

50. *Mercredi v Chaffe* (supra) speaks of habitual residence in terms of the permanent or habitual centre of a person's interests, see §51:

> "….in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation [Brussels IIR] does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case."

51. The English approach can be found in per *R v Barnet London Borough Council, ex parte Nilish Shah* [1983] 2 AC 309, and *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, at 578 and 454. The formulation in *Shah* is as follows:

> "a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration"

52. The judge also had regard to the fact that habitual residence may be acquired despite it being intended that the purpose of the move would be fulfilled within a comparatively short duration or where the

move was only on a trial basis, see *Al Habtoor v Fotheringham* [2001] 1 FLR 951; *Re P-J (Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588, [2009] 2 FLR 1051.

53. No one criticised the judge's statement of the law as far as it went. They complained about his application of it to the facts. They also argued that the judge should have given weight to the children's own views and perspective in determining their habitual residence.

54. In what follows, I refer to English, European and Hague cases. All are relevant. In *DL v EL and Reunite* [2013] EWCA Civ 865 @ §48, Thorpe LJ accepted that there is now no distinction between the test for habitual residence according to our domestic law, the test expounded in the CJEU and the autonomous law of the Hague Convention.

55. Before us, it was not argued that there is, as yet, any authority to the effect that a child can determine his or her own habitual residence, independently of the parent with whom they are living. However, it was argued on behalf of F and the children, to a greater or lesser extent, that that is possible.

56. The starting point is perhaps *Gillick v West Norfolk AHA* (supra) for its recognition that "parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision" (@ 251).

57. It was also said to be material that in the wider context of family law, the views of children are increasingly listened to as exemplified, for instance, in judges meeting children who are involved in cases (see Guidelines for Judges meeting children who are subject to Family Proceedings 2010) and in a different approach to children giving evidence in family proceedings (see *Re W (Children) (Abuse:Oral Evidence)* [201] UKSC 12 [2010] 1 FLR 1485 and Guidelines in Relation to Children Giving Evidence in Family Proceedings) and see also the well known authorities about hearing the views of children in the context of Hague cases.

58. Reliance was further placed on the Explanatory Report to the Hague Convention by Professor Elisa Perez-Vera, part of which concerns "children under sixteen who have the right to choose their place of habitual residence" (§78). It was submitted that the report shows that the drafters of the 1980 Hague Convention recognised "the possible autonomy of children as individuals" from the outset.

59. We were asked to interpret habitual residence having regard to the best interests of children and therefore to allow for considerable weight to be given to their views. The basis for this was that the grounds of jurisdiction established in Brussels II Revised (of which habitual residence is one) were shaped in the light of the best interests of the child, see recital 12 to the Regulation.

60. We were invited to infer that, whilst they do not determine it expressly, the authorities on habitual residence recognise that a child may be able to determine his or her own habitual residence. This was said to appear from *Mercredi v Chaffe* §§51 – 57. In that case, a two month old baby who had been habitually resident in England was taken to Réunion by her mother who was a French national and had been born there. Days later, her British father began proceedings in the English High Court. The English court held that the baby was still habitually resident in England at that time. The mother appealed against that decision and the Court of Appeal referred a number of questions to the Court of Justice of the European Union for a preliminary ruling, amongst them the question of the appropriate test for determining the habitual residence of a child for the purposes of Articles 8 and 10 of Brussels II Revised (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). It seems to me that it is helpful to have reference to quite a long passage from the

decision. I have already quoted the substance of §51 of the decision above but for ease of reference I will repeat it here. I do not consider that §57 is material to the debate and I have omitted it in what follows:

> "[47] To ensure that the best interests of the child are given the utmost consideration, the court has previously ruled that the concept of 'habitual residence' under Art 8(1) of the Regulation corresponds to the place which reflects some degree of integration by the child in a social and family environment. That place must be established by the national court, taking account of all the circumstances of fact specific to each individual case (see *Re A*, para 44).
>
> [48] Among the tests which should be applied by the national court to establish the place where a child is habitually resident, particular mention should be made of the conditions and reasons for the child's stay on the territory of a Member State, and the child's nationality (see *Re A*, para 44).
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> [49] As the court explained, moreover, in para 38 of *Re A*, in order to determine where a child is habitually resident, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent.
>
> [50] In that context, the court has stated that the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence (see *Re A*, para 40).
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> [51] In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case."
>
> [52] In the main proceedings, the child's age, it may be added is liable to be of particular importance.
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> [53] The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.
>
> [54] As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.

> [55] That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant.
>
> [56] It follows from all of the foregoing that the answer to the first question is that the concept of 'habitual residence', for the purposes of Arts 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case."

61. *Mercredi v Chaffe* should be read having in mind the observations of this court in *DL v EL and Reunite* (above) about the reasons why the references in it to "permanence" should be downplayed (at least).

62. Reliance was also placed on *Re A (Area of Freedom, Security and Justice)* (C-523/07) [2009] 2 FLR 1. In *Re A* we can see the sources of some of what was later said in *Mercredi v Chaffe*. I will not repeat that here. It was argued that the facts were of importance because they show the acceptance by the then European Court of Justice that children can have a separate habitual residence from their parents. I am not sure about whether the facts do show that, but in any event I am not convinced that the case is helpful for our present purposes, given that the parents and children were not living together, the parents having left the children in Finland and returned to Sweden.

63. Four further cases, all decided in the Family Division, were cited for illustrative purposes. They were two decisions of Peter Jackson J (*Re I (A Child: Habitual Residence)* [2012] EWHC 3363 (Fam) and *Re J (A Child: Habitual Residence*) [2012] EWHC 3364 (Fam), one of the then McFarlane J (*N v N* unreported 25 September 2007) and one of Bodey J (*Sheffield CC v Bradford MBC*, supra).

64. Both *Re I* and *Re J* undoubtedly proceed on the basis that a child can have a separate habitual residence from his parents and I do not regard that as controversial; it all depends on the facts. In *Re I*, the 7 year old boy, whose parents were Nigerian nationals and lived in Nigeria, had been living with his aunt and uncle in England from the age of two. He was barely visited by his parents and the aunt and uncle took the entire responsibility of bringing him up. He was habitually resident in this country whilst the parents were habitually resident in Nigeria. In *Re J*, the 7 year old girl was born in England in 2005 and then left by her mother with her grandparents here in 2006, the mother returning to the United States. The girl was brought up by the maternal grandparents, having only video contact with the mother. The grandmother had a residence order. The girl's father and paternal grandmother also had a significant relationship with her through regular visits and stays. In June 2012, the maternal

grandparents secretly flew with the girl to America where they handed her over to her mother, also taking up residence there themselves. Up to that point, the girl was habitually resident in England and Wales. One question the judge had to determine was whether she had lost that habitual residence less than two weeks after she left England, which was the date on which her father issued an application for a parental responsibility order here. Peter Jackson J commented that:

> "the unusual aspects of A's family situation call for particular respect to be paid to her individuality as opposed to treating her as an adjunct to any of the contending adults. From her perspective, it will have been a considerable surprise to have been removed from everything she knows without any preparation, such as goodbyes to school, friends and family, and shortly afterwards to be placed in the care of a mother who she hardly knew." (§42)

65. He said:

> "The reality is that she is an English child who has spent all of her 2500-plus days of life as a habitual resident of this country and I do not find that she has lost that status as a result of a contrived absence of 13 days. Her roots here are deep and her habitual residence did not change as a result of this legally insecure removal." (§44)

66. *N v N* is inconclusive on the question of whether a child can unilaterally change his or her habitual residence. The argument was developed but it was not necessary for McFarlane J to determine the question as he found that the evidence did not get anywhere near to establishing that it had happened in that case. The child was 12. She started life living in Zimbabwe. Both of her parents mostly lived away from Zimbabwe and her care was delegated to schools or to the grandparental generation in Zimbabwe. Then the father settled in South Africa and the child, then nearly 11, was sent to him there, remaining there for over 18 months before coming on what was intended to be a holiday to England where the mother was living. In South Africa, the child had settled down, was established in the home of her father and his family, and went to school. Notwithstanding the mother's protestation that she had not agreed to the move to South Africa, she had done nothing to disrupt it and McFarlane J found that the child had become habitually resident there. It was argued that she had lost that South African habitual residence because she left South Africa unwilling to go back and told her mother on arrival that she would not do so and wanted to live with her. Her main driving motive was to be with her mother and she told the CAFCASS officer that it did not matter which country she was in provided that happened.

67. In *Sheffield CC v Bradford MBC* the question was what was the ordinary residence of a 14 year old boy for the purpose of designating a local authority in respect of a care order. The boy lived with his mother in Bradford. Following an incident, the mother refused the boy entry to her house and he went to live with an aunt and uncle in Sheffield with the agreement of the mother. The boy expressed his determination to stay with the aunt and uncle and Bodey J found that the mother agreed to a continuation of that de facto arrangement. He found that as from the date when the boy started to live with his aunt, he was competent to form his own intentions about his future, he was sufficiently secure and settled and had a settled intention to make his future home with her. He found that the two months that the boy spent there on that basis was a sufficient period for him to have become ordinarily resident there.

68. There were differences of emphasis between the arguments advanced on behalf of F, T, and L and A.

69. Although in his skeleton argument, Mr Feehan QC (who appeared with Mr Hames for F) argued that

there must come a time when a child is entitled to decide upon his or her own habitual residence, he did not, in oral argument, go so far as to urge us to decide that a child can choose his or her habitual residence. He put the case rather on the basis that the wishes and feelings of the child and his or her psychological integration into the country in question were relevant to the fact of whether the child was integrated there. He argued that T and L were plainly competent to understand the concept of where they live and where their home is and that given their level of competence, their views were crucial in determining habitual residence. He relied heavily, as did all those advocating that the children were habitually resident in England, upon what the children said to the CAFCASS officer about not having settled in Spain and seeing England as their home. It was not only that the children did not consider themselves to be integrated, he said; there was other evidence to which the judge failed to give appropriate weight which also suggested there had been no genuine integration. He listed the last minute decision to go to Spain and late notice to the English schools, the continued payment of benefits for the children in England, the shortness of the time spent in Spain, the temporary nature of the accommodation there, M's not having secured adequate employment there, T's disapproval of the Spanish school, the CAFCASS officer's statement that "Objectively, not just in their perception, England has been home for them" (§47 of the first CAFCASS report), and the children's resolute resistance to a return to Spain. He also relied on T's statement that despite a period of bullying she was not so fundamentally unhappy at school in England that she wanted to relocate to Spain.

70. It was Mr Williams QC and Ms Renton on behalf of T who went furthest in advancing the argument that a child, and T in particular, can determine his or her own habitual residence. This was something that the judge should have considered, of his own motion if it was not argued actively in front of him, they submitted. They acknowledged that there is no existing authority establishing the clear proposition that a child can do this but suggested that it could be identified in the current law even though not spelled out. They asserted that it would only be in rare cases that it would be a material issue. Even if the impact of T's views fell short of amounting to determination of her own habitual residence, it was submitted that the views or perception of a child have an impact on whether the child has integrated into the new country, and the older the child the greater the impact. It was submitted that the judge did not consider the issue at all, focussing instead on the parents' intentions and their evidence generally. Whilst the judge dealt with what the children said about life in Spain when he dealt with their objections, it was submitted that reliance could not be placed on this to show that he had had this evidence in mind when considering the question of habitual residence.

71. For L and A, Mr Gupta QC (who appeared with Mr Edwards) supported T's arguments that she could determine her own habitual residence but did not actively pursue that in relation to the boys. He submitted that in their case it was more appropriate to approach the question of habitual residence by analysing the fact of their integration in which their perspective played a part. He submitted that what the boys were saying to the CAFCASS officer showed that they had not integrated into Spanish life and that Cobb J had failed to recognise the importance of that in his decision on habitual residence.

72. Mr Setright QC and Mr Devereux for the mother relied upon *Re P-J (Abduction: Habitual Residence: Consent)* (supra, see particularly §26), *Re H-K (Habitual Residence)* [2011] EWCA Civ 1100. [2012] 1 FLR 436 and *Mercredi v Chaffe* (supra) as the definitive statement of the proper approach to habitual residence for the time being. They submitted that developing the existing position by holding that children can determine their own habitual residence would have significant consequences for the operation of the Hague Convention. They submitted that the path that was being pursued was overly technical and inappropriate for what is a summary procedure. In any event, they said, there was no foundation for such an extension of the law. They reminded us that the ordinary presumption was that a child takes its habitual residence from the parent with whom he or she lives and

submitted that the only instances of children having separate habitual residence from their parents so far have been where they are living separately from their parents. Here, in any event, the judge's findings of fact were open to him, they said, and followed the hearing of oral evidence. As can be seen from what the judge said when refusing permission, he did take account of the children's views in making his determination as to habitual residence, they submitted.

Discussion and conclusions in relation to habitual residence

73. The existing authorities undoubtedly show that a child may have a habitual residence which is different from that of his parents. However, they do so in the context of children who are not living with their parents and they are therefore in no way surprising. For reasons which will become apparent, I do not consider that it is necessary, in order to determine this appeal, to decide whether or not a child who is living with a parent can have a different habitual residence from that parent. That would not be a decision to take lightly as it would potentially introduce considerable complexity into some Hague cases. I am not persuaded by the argument that it would only be in rare cases that it would be asserted that a child had a different habitual residence from the parent with whom they were living. The facts of this case are not that distinctive and if the argument can be advanced here, then I think it likely that it would become a regular, if not common, feature of Hague cases where the children are no longer small. That particular decision must therefore await a case in which it is strictly necessary for the litigation.

74. It is important to remember that habitual residence is essentially a question of fact to be determined by reference to all the circumstances of the particular case. The answer depends "more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind" (Lord Scarman in *Shah*, cited by Ward LJ in §26 of *Re P-J (Abduction)*). The conventional starting point is that the child takes his or her habitual residence from the parent with whom he or she lives. However, I think I might be prepared to accept, although I am not determining this here, that part of the relevant factual circumstances in a suitable case may be the way in which the children reacted to their move of residence. Much depends on the age and stage of the child concerned, as comes over from *Mercredi v Chaffe*, but it is not hard to imagine a situation in which an extreme adverse reaction of older mature children to their arrival in the new country could be sufficient to disrupt their parent's plans to integrate there and establish his or her habitual centre of interests. In considering this, it would be important to keep in mind what Lord Scarman said (see above) and to be cautious about evidence as to state of mind. Furthermore, where children of the sort of ages of these children are living together with their parent and where, as Mr Setright submitted, there is no evidence that any of them had practical autonomy independent of the decisions of their parents, I think a very firm focus would need to be kept on the family as a whole, albeit made up of its constituent parts.

75. For the sake of argument, let me pursue this idea that the children's perspective is capable of being influential in the decision as to habitual residence. Did Cobb J ignore it or fail to give it proper weight in his deliberation?

76. It is important to recall once again the advantage that the judge had over us in having heard evidence from both parents and from the CAFCASS officer. As a result of his unassailable finding that F consented to the move to Spain, the starting point for his deliberation on habitual residence was that the children went to Spain to live with the agreement of both parents.

77. A major part of the evidence as to the circumstances of the move and the circumstances once the children were in Spain came from the parents. In their statements, their positions were polarised and there was no suggestion that their evidence was materially different orally. F's primary position was that

he had not agreed to the move but his alternative argument was that the children had not settled in Spain. He described them as appearing totally lost when he went to see them in Spain in November and said they were clearly not happy there (see for example §31 of F's first statement). He described how they were adamant in January 2013 that they would not return (ibid §34 et seq) and wanted to live in England. M described the arrangements that had been made in Spain about accommodation and school. She said that the children settled well, integrated into the community and were happy with the move until F came over in November (see for example §24 of M's first statement and §9 of M's second statement). She provided Spanish school reports, including a report from T's head of studies which said that "T had a good school performance and always showed a perfect adaptation to the course and the Academy" (Trial Bundle C182). Even F acknowledged that the children had done "reasonably well in the schools in Spain" (§26 of F's second statement). M pointed out that the children had friends and family in Spain whom they have known since they were born (§9 M's second statement).

78. Having heard the parents cross-examined and considered such documentation as there was to assist, Cobb J would have had ample foundation for a finding that the children were settled and integrated in Spain, subject to anything which came out of the interviews with the CAFCASS officer with which I will deal separately in a minute. F's evidence reflected that now advanced by the children but it was open to the judge to accept M's evidence rather than F's. It was important that the context in which he made his finding was that the children were Spanish nationals, with a Spanish mother and a Spanish extended family with whom they were familiar, having visited regularly for holidays, and they were more or less bilingual.

79. What about what the children said to the CAFCASS officer upon which so much emphasis is now placed by those who contend that the children never lost their habitual residence in England? The judge set out the important aspects of the children's CAFCASS interviews in his judgment, albeit in the section concerning the children's objections rather than as part of his consideration of habitual residence. His account included reference to T's dismissive attitude to educational standards in Spain, her criticism of M for removing them from England and for her failure to prioritise their needs thereafter. He also gave an account of T's email. There is no question but that the judge was aware that the children were saying, in their various ways, that they regarded England as home and where their roots are and where, according to L, they are "cosy".

80. The judge recognised that T's age and maturity dictated that he should take account of her views, and similarly those of L and A who he described as "thoughtful and intelligent". But he also found that each child felt "deeply torn" by the current situation.

81. It is right that the judge did not refer to the CAFCASS evidence in the passage in his judgment where he dealt with habitual residence but only later on. When he did so, however, it was clear he had a full grasp of it. What is important is that when he dealt with the application for permission to appeal, he tied together the CAFCASS evidence about the children with the question of habitual residence when he said that:

> "The stated wishes of the three older children to be in England now...did not affect their integration in Spain at the time."

82. I do not accept that an experienced family practitioner and judge such as this would have ignored the evidence from the CAFCASS officer when evaluating the evidence of the parents and this passage in the permission document confirms, I think, that he did not.

83. What the children were saying to the CAFCASS officer now they were back in England did not, of course, necessarily reflect how they felt at the time when they were actually living in Spain. There was no question of their views being anything other than their own views at the time of the interviews but that does not mean that they were seeing and describing the history accurately by then. According to M's evidence (which the judge must have accepted) with some support from the school material, they were not. By the time of the CAFCASS interviews, the battle lines were being drawn. T was ultimately to speak in an email in June 2013 of "My father's team, the team that I wish to back". She seems to have been becoming increasingly estranged from M about whose actions she now felt considerable resentment. The judge recorded Ms Vivian's view that her alignment with F represented a shift in attitude from her earlier alignment with M and had undoubtedly affected her view of M and probably of Spain too.

84. What the children said to Ms Vivian was only part of the picture and I have no doubt that notwithstanding it, the judge was entitled to find, as he did, that the evidence established that the children had settled reasonably well in the maternal grandmother's flat, settled into their new schools which they appeared to enjoy, and made friends, see §42 of the judgment.

85. So even allowing for the children's perceptions to have an impact upon the question of where their habitual residence is (which I stress I have pursued as a hypothesis rather than an established proposition of law), they were sufficiently dealt with by the judge who arrived at his finding notwithstanding them. Still less did the evidence provide the foundation for a successful argument that, if legally possible, T (or any of the other children) had determined that their habitual residence remained England.

86. I would therefore dismiss the appeal against the judge's finding that the children's habitual residence was in Spain on the operative date.

Children's objections

87. I propose to deal first with the appeal in relation to the judge's refusal to categorise L and A's views as objections.

88. The judge's assessment of the evidence persuaded him that the views of the boys fell short of clear objections to returning to Spain. He set out his reasons for this in §101 ii) of the judgment.

89. No challenge was made to the judge's statement of the principles he had to apply to this part of the case. The argument was that each boy's wish to remain in England amounted to an objection and the judge was not entitled to view it in any other way; it was not just a preference. This was established, it was submitted, by the combination of their expressed feeling that England is where their home is and where they belong, L's wish to ask the judge "Can I please stay here?", and their behaviour when the return to Spain was due, including hiding their passports. It was submitted that they were evincing clear objections but that even weak objections can be objections; the strength of the objection is a factor to be considered once the discretion comes into play, see *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 2 FLR 251 @ §46. Their views about remaining in England, it was said, are not qualitatively different from T's.

90. A very important part of the material on which the judge had to determine this issue was the contribution of the CAFCASS officer. In this case, unusually, Ms Vivian had seen the children twice and she prepared lengthy and thorough reports as well as giving oral evidence. I will pick out some features from her reports and oral evidence.

91. Ms Vivian reported that L was expressing some ambivalence about a return to Spain. Asked if it would be the end of the world for him if he were returned to Spain, he said "for me it would I would really like to stay here". He told Ms Vivian that he liked Spain but not as much as England which is "where I live", though he liked the Spanish and English schools the same. What he wanted was "Parents back together and have a proper family", and he said that "If I do stay here my parents will get back together maybe someday and have a proper life", although in his later interview he thought that would not happen because "my mum doesn't like my dad". He said that he had been "missing mum" and he was "sad if she is there and I am here".

92. Ms Vivian reported that A found the process of having to express a view aligning himself with one or other parent very difficult. He said: "I don't really know. I am not very confident in any of this, my brain is not working it does not tell me what to say". He did tell Ms Vivian that he would say to the judge if he said they had to return to Spain, "let us stay here, no life there" but he also said "I don't mind really if I go or stay. If Spain had my school with my friends then I wouldn't mind and got to see dad".

93. The judge set out facets of Ms Vivian's oral evidence at §98. They included that both boys missed their mother whilst with their father and vice versa (and also that, in Ms Vivian's view, deep down T also missed M hugely), that the boys were clear that England is where they live and that L feels "cosy" here but that both struggled with torn loyalties and expressed some ambivalence about a return.

94. The CAFCASS officer was questioned during her oral evidence about whether the boys' views should be described as objections or not. At one point (D40 of the Appeal Bundle) the questions and answers went like this:

> "Q You were happy to use the word "objections" about T's wishes and feelings. Would you not, on reflection, use the same term to describe the boys' feelings?
>
> A Yes. It's a very difficult one, because I guess I didn't get the same sort of verbal response perhaps that I did from T. I very much know that both boys were feeling pulled about their mum, and were perhaps more reluctant to be quite so open about things. So I guess that's why I am struggling slightly with using the terminology of "objection".
>
> Q It does not fit quite in the same way?
>
> A No, but it doesn't mean that it's not there either. You know, that makes sense.
>
> Q But I think you accept that they were as strong as T about wanting to remain in England for the reasons that you have outlines.
>
> A Yes. I guess it was just slightly different, but it doesn't mean it's any less important, if that makes sense."

95. I think what we can see here is the CAFCASS officer struggling to put into words a sense that she had about the boys' feelings. This is just the sort of situation in which the trial judge, who hears the evidence unfolding and then considers it along with everything else that is known, is far better placed than someone who merely reads the transcript of evidence later. Cobb J interpreted Ms Vivian's evidence as being that T's views could properly be called objections but the boys' could not and were properly described as strong and clear "preferences" to remain in England.

96. As Mr Gupta and Mr Edwards submitted, it is the judge's function to determine whether a child's views amount to an objection or not, rather than the job of the CAFCASS officer. However, an

important part of the evidence upon which the judge reaches his determination is the report and evidence of the CAFCASS officer, rightly so given the expertise of a CAFCASS officer such as this one in interviewing children in these circumstances and her neutral position in the litigation, in contrast, for instance, to the position of a legal representative of the children or a member of F's or M's household. The sense which Cobb J got from Ms Vivian's oral evidence and from the rest of the relevant material was that the boys' feelings fell short of objections. I am not persuaded that he can be said to have been wrong to reach that view and I would dismiss the appeal against this categorisation of the boys' views.

97. The "new" evidence about the boys' views emanating from their solicitor, which is said to show that their views have hardened since the CAFCASS officer saw them should, in my opinion, be treated with caution. Although no doubt very experienced, their solicitor has a different role and different expertise from the CAFCASS officer. Given the presentation of the boys to Ms Vivian, particularly their ambivalence, inconsistency and confusion, their loyalty to both parents and their then reluctance to be drawn into articulating their views, I would be cautious about altering decisions taken in relation to them on the basis of this later material emanating from a different source and in a climate which has become rather confrontational for some of the family, at least.

The judge's exercise of his "discretion" with regard to T

98. The judge decided that he would not decline to order T's return to Spain despite her objections to doing so. His reasoning can be found at §§106 to 112 of his judgment.

99. He did not consider that it would be right to give determinative weight to T's views even though she was bright and determined and he respected them. He took this view because T had aligned herself with F, in contrast to her earlier alignment with M, and he thought this had affected her view of M and probably Spain too. He thought her objections to being in Spain were inextricably linked with her views about being with M and believed that M and T needed to work out their differences which would not happen if T lived with F in England. He thought T had a distorted view of recent family history, wrongly blaming M for certain things, which could not go unchecked and may be influencing her present attitude. He noted that she had not always been so confident in her views and that F had described her in an email of 21 January 2013 "very confused". He did not think that T had thought through the consequences of her position and considered that her objections may well modify on her return to Spain and once her parents were able to have a sensible dialogue about the way forward. He noted that T's objections to being in Spain were influenced by her view that the education there is inferior but he could not ignore that she had been unhappy at school in England too.

100. The judge was also influenced by Ms Vivian's view that T missed M although she (T) could not acknowledge that, by the fact that the parties had jointly intended that the children would return to Spain in January 2013, and the desirability of keeping the siblings together. There were also some practical points that had a bearing, namely Ms Vivian's view that T would follow the court's order and that F would do his best to facilitate her return. As for the policy of the Hague Convention, he said:

> "I should attach weight to the policy of the 1980 Hague Convention, weighing heavily as it does in cases where there has been a wrongful retention following the conclusion of a holiday"

101. Once again, the criticism of the judge was not that he misstated the approach he should take to the issue but that he failed to weigh the relevant factors correctly. I will be forgiven, I hope, for concentrating on the submissions of T's counsel which largely covered similar ground to those made on

F's behalf.

102. They submitted that greater weight should have been placed on:

i) T's objections, given their strength and her age and maturity;

ii) The fact that T had spent the whole of her life in England save for 6 months in Spain; and

iii) T's views on her Spanish education, which should not have been downplayed because of the difficulties she had apparently had in her English school before she left for Spain.

103. Conversely, they submitted, less weight should have been put on policy considerations, given that England was the children's familiar environment and the natural forum for determining their future. This was a point particularly developed also on F's behalf. In this case, it was also submitted that it was now some time from the wrongful retention and therefore Convention considerations had less weight than might otherwise have been so.

104. Mr Williams and Ms Renton submitted that the judge had correctly stated the four points made by Ward LJ in *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192 in relation to how to evaluate a child's objections but had failed to deal with three of them. He should have taken account of T's proper understanding of what the future holds in Spain and England, the fact that her objections are rooted in reality, and the fact that they are her own and not the product of influence. He failed to identify an evidential basis for concluding that her objections would be modified on her return to Spain and, they submitted, that conclusion was inconsistent with T's general presentation. He was also wrong to assume that she would return if ordered to do so as she has consistently said she would not.

105. They criticised his view that her objections were inextricably linked with her views about M, because he had said earlier in the judgment that her strong feelings about M were different from the objections that she had to returning to Spain (§100 iii) of the judgment). I can deal with this criticism immediately because I think it is based on a misinterpretation of what the judge was saying at §100 iii). It seems to me that that paragraph differentiated between T's objections to returning to Spain and her feelings about M in order to be clear that the judge was finding that she had a distinct objection to returning to the country, separate from her feelings about the person to whom she would return. I do not see this as inconsistent with his later analysis of the situation between T and M.

106. They also submitted that the judge did not consider whether the exercise of his discretion was necessary and proportionate. In this context they relied upon *Re B* [2013] (supra), which was of course decided after the hearing in front of Cobb J, in support of their submission that the discretion must be exercised in a way that is compatible with T's Article 8 ECHR rights.

107. To these submissions, should be added F's submission that the judge's desire to ensure that T had a correct view of history was not a reason to ignore her wishes and that the better way to bring her to a balanced view would have been to respect her wishes and to encourage contact.

108. On behalf of M it was submitted that the judge had a very firm evidential background on which to base his views and that these were justified. Policy was an important consideration, Mr Setright argued, and remained so notwithstanding the time that had elapsed since the retention. If it were not so, it would enable parents to spin out the process so that the court will decline to return children who object. There were already proceedings in Spain which has jurisdiction and it was better for the children to be returned there for their futures to be determined. Furthermore, he submitted, family life needs to be

rebuilt in Spain.

109. I have been considerably troubled by this aspect of the case. I would not interfere lightly with a careful balancing exercise such as that carried out by Cobb J. However, even allowing for the benefits that he had in hearing the evidence, I am driven to conclude that two important factors were not given the appropriate weight.

110. First, I am not convinced that sufficient weight was given to the fact that the whole of T's life has been spent in England, the time in Spain being a short interlude in it. The shortness of the interlude in Spain is underlined and reinforced by the time that has elapsed since the wrongful retention of the children, during which T has started at a new school in England.

111. The judge seems to have given the policy of the Hague Convention considerable weight because this was a retention following the conclusion of a holiday. In some ways, that is an understandable (and accurate) categorisation of what happened here. However, it needed, I think, to be put in context. It had not been possible to determine the case within the normal six week period and, as time elapses, it is no longer as simple to achieve Hague objectives. Furthermore, this is not, in fact, a case in which returning T to her habitual residence will achieve the usual Hague objective of returning her to the place best able to determine her future, although I accept that the whole question of litigation to resolve these children's futures is a complex one. There is the considerable complication that the jurisdiction in which proceedings are currently pending is Spain. It may not be straightforward to ensure a transfer of the proceedings to England, particularly if the boys return to Spain.

112. Secondly, so robust and determined are T's objections to returning that I think very considerable weight has to be given to them and I am not persuaded that this was sufficiently recognised. I have to acknowledge that the time that has elapsed since the hearing before Cobb J may well have demonstrated the position more clearly. It seems to me unlikely that things have improved since that time, given the instruction of lawyers by all children but N, the subsequent hearings, the failed mediation, lack of success over contact and so on. I entirely understand why Cobb J took the view that he did about the need to put right T's understanding of the family history and to repair her relationship with M but I am not convinced that returning her to Spain against her wishes is likely to be conducive to that.

113. In all the circumstances, I would reverse Cobb J's decision to return T to Spain.

The younger boys

114. Accordingly, the question arises as to what should happen to the younger boys and whether the circumstances are such, in their case, as to give rise to a "defence" under Article 13b) on the basis that there is a grave risk that their return would expose them to physical or psychological harm or otherwise place them in an intolerable situation..

115. M wants all the children to return to Spain but her alternative case, if T is to stay here, is that the boys should still return to Spain. Mr Setright invited us to order that, but he acknowledged that if we felt unable to do so given the paucity of evidence, we might remit the matter for consideration in the Family Division.

116. F submitted that no one but T had ever suggested that the children should be split, that it would be intolerable and it should not happen.

117. Mr Gupta on behalf of the older two boys submitted that the children were a tight sibling group and

that they should not be split.

118. Cobb J did not have to consider this issue as it did not arise on his findings.

119. It appears there was very little evidence about the possible impact on the children. The CAFCASS officer said in her oral evidence that they appeared to be a very close sibling group and that it was always very unfortunate to separate siblings, particularly across jurisdictions (D37 of the Appeal Bundle). At that point, Mr Setright intervened in Mr Hames' cross examination of the witness to point out that the CAFCASS officer's remit had not been to look at that issue and she confirmed that she did not feel able to offer any more assistance.

120. If the boys return to Spain and T stays here, there will be a separation of the siblings for at least some months. Unless the parents unexpectedly manage to arrive at a consensual solution to the problems that are so distressing this family, a court is going to have to sort out what the future arrangements are to be for the children and this will take time. There is no doubt at all that the resulting separation will have an impact on the whole family but I find it very difficult to tell, on the basis of the present material, whether it would place the boys in an intolerable situation to be returned when T is not.

121. I have in mind that although the boys did not "object" to returning to Spain, they were the ones who hid the passports and their wish appears to have been to stay here. On the other hand, things are not straightforward as they were, as Cobb J found, missing their mother.

122. I also have in mind that since Ms Vivian gave her limited evidence on the issue before Cobb J and described the feelings of the boys as they were then, considerable water has flowed under the bridge. The older two boys have instructed their own solicitors, without the shielding influence of a guardian, and have taken a stance in this litigation.

123. I do not wish to protract the uncertainty for the children but I am driven to conclude that the appropriate course would be to remit this remaining question to the Family Division for determination as quickly as possible in the light of our decision in relation to the remainder of the case. It will be necessary for there to be a very urgent directions hearing so that the structure of the remitted hearing can be determined and the new hearing fixed.

124. If the parties are able to agree to Cobb J hearing the case again, if available, I would not myself consider that necessarily inappropriate, but I can see that it is probably unlikely that it would find universal favour. The boys (and T) have been joined to the litigation only as parties to the appeal. If the boys seek to be joined as parties to the remitted hearing, they will have to make applications in the Family Division. I have no doubt that the judge will expect careful consideration to have been given to whether they should have the benefit of a guardian and whether they can really manage the litigation without. In any event, I dare say that consideration will be given to whether CAFCASS should once again advise on the final question that remains for determination.

LADY JUSTICE GLOSTER:

125. I agree.

LADY JUSTICE HALLETT:

126. I also agree.

URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2013/1058.html*