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

Michaelmas Term
[2019] UKSC 49
On appeal from: [2019] EWCA Civ 1065

JUDGMENT

In the matter of NY (A Child)

before

Lord Wilson
Lord Hodge
Lady Black
Lord Kitchin
Lord Sales

JUDGMENT GIVEN ON

30 October 2019

Heard on 18 July 2019

Appellant
Mark Twomey QC
Alex Laing
Dr Rob George
(Instructed by Dawson Cornwell)

Respondent
Henry Setright QC
Mark Jarman
Michael Gration
(Instructed by Ellis Jones Solicitors LLP (Bournemouth))

Intervener (1)
Teertha Gupta QC
Jacqueline Renton
Jennifer Perrins
(Instructed by Freemans Solicitors)

Intervener (2)
Christopher Hames QC
Michael Edwards
Charlotte Baker
(Instructed by Bindmans LLP)

Intervener (3)
Timothy Scott QC
(Instructed by SKO Family Law Specialists (Edinburgh))

Interveners:- (written submissions only)

(1) Reunite International
(2) The International Centre for Family Law, Policy & Practice
(3) International Academy of Family Lawyers

LORD WILSON: (with whom Lord Hodge, Lady Black, Lord Kitchin and Lord Sales agree)

Introduction

1. A father applies under the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention"), set out in Schedule 1 to the Child Abduction and Custody Act 1985 ("the 1985 Act"), for a summary order for the return of his young daughter from England to Israel. The mother opposes the application but a High Court judge grants it. On the mother's appeal the Court of Appeal rules that it had not been open to the judge to make an order under the Convention. So it sets his order aside. But the Court of Appeal then proceeds to invoke the inherent jurisdiction of the High Court ("the inherent jurisdiction") and, pursuant to it, the court makes a summary order analogous to that made by the judge, namely for the immediate return of the child to Israel, in substitution for his order under the Convention.

2. The overall question raised before us by the mother's further appeal has been whether the Court of Appeal was entitled to make the summary order for the child's return to Israel under the inherent jurisdiction. But the question has been broken down into two parts. First, was the inherent jurisdiction in principle available to be exercised in the making of a summary order for the child's return? Second, if so, was the Court of Appeal's approach to the exercise of the jurisdiction flawed?

3. This court has already answered the overall question. It heard the appeal on 18 July 2019 and received the last of the parents' further written submissions on 1 August. It was conscious of the urgency of the decision. The aspiration set out in Practice Direction 3.4.5(c), annexed to the Supreme Court Rules 2009, is for the result of an appeal in a Convention case to be given within two weeks of the end of the hearing; and the court considered that the aspiration should apply equally to the instant appeal. On 14 August 2019 it therefore made its order, which was that the mother's appeal be allowed and that the Court of Appeal's order under the inherent jurisdiction be set aside. By today's judgments, the court will explain its reasons for having made that order. In doing so it will explain why its answer to both parts of the overall question is "yes".

Facts

4. The mother and father are Israeli nationals, aged 31 and 29 respectively. They married in 2013 and have only the one child to whom I have referred. She is now aged almost three. They lived in Israel with the father's parents. The father worked as a police officer. The marriage ran into difficulties and, partly as a result of them, the parties decided to move, with the child, to England. The move took place on 25 November 2018. They rented a flat in North London. The father found employment as a waiter and the child started to attend nursery school. Although both parents regarded it as possible that, were the marriage to break down, they would return to live separately in Israel, there was no agreement that they would necessarily do so.

5. In London the marriage quickly broke down. On 10 January 2019 the father told the mother that he intended to return to live in Israel; and he sought to insist that, with the child, the mother should also return there, where issues between them could be resolved. While accepting that the marriage had broken down, the mother replied that she proposed to remain with the child in London. On 14 January 2019 the mother called the police and alleged to them that the father intended to kidnap the child. The police advised the father to leave the flat. He thereupon returned to Israel, where he continues to live. The mother continues to live with the child in London. Acting by lawyers, the father quickly issued proceedings for divorce and custody of the child in the Rabbinical Court of Jerusalem, which remained pending at the date of the hearing before the judge.

Judgment at First Instance

6. The factual allegation which formed the basis of the father's application under the Convention was that, on the day when the marriage finally broke down, namely 10 January 2019, the mother had wrongfully retained the child in England and Wales.

7. The first of the mother's three contentions by way of defence was that the child had become habitually resident in England and Wales by 10 January 2019. By his written judgment handed down on 17 April 2019, [2019] EWHC 1310 (Fam), [2019] 3 FCR 82, following a hearing on 15 April, the judge (MacDonald J) rejected this contention and the Court of Appeal refused to permit the mother to appeal against his rejection of it. For present purposes it is therefore an established fact that, at any rate until 10 January 2019, the child remained habitually resident in Israel.

8. The second of the mother's contentions was that her retention of the child on 10 January 2019 had not been wrongful. She linked this contention with an assertion

pursuant to article 13(a) of the Convention that the father had given a relevant consent. Although in earlier presentations of her case she had alleged that he had consented both to the child's removal from Israel on 25 November 2018 and to the retention of her in England on 10 January 2019, her case of consent became properly focussed in the position statement laid on her behalf before the judge: it was simply that he had consented to her retention of the child on 10 January. For the father's consent to the child's removal from Israel on 25 November was irrelevant to his claim of wrongful retention.

9. As the Court of Appeal was later to hold, the proper focus of the mother's case of consent for some reason became lost during the hearing before the judge. Her case was taken to be that the father had consented to the child's removal from Israel on 25 November. In relation to that point, the judge received brief oral evidence from the mother, from a male friend of hers and from the father; and it is important to note that the judge received no oral evidence on any other aspect of the case. In the event he held that the father's consent had been operative at the time of the child's removal from Israel; that the mother had therefore established a defence under article 13(a) of the Convention; and that the defence yielded to him a discretion not to order the child's return to Israel.

10. The third of the mother's contentions, made pursuant to article 13(b) of the Convention, was that there was a grave risk that a return to Israel would expose the child to physical or psychological harm or would otherwise place her in an intolerable situation. In this regard the mother, in her written evidence, made what appeared to be serious allegations of domestic abuse against the father. She alleged that his work as an Israeli policeman had in effect brutalised him; that during the marriage he had pushed or hit her every two or three weeks; that he had once held a gun to her head and had frequently demonstrated how he could crush her skull with his hands; and that once in Israel and again on an underground train in London he had even assaulted the child.

11. The judge weighed the mother's allegations of domestic abuse against the father's written denials and, in particular, against other material which on any view raised substantial concern about her credibility in that respect. For, in text messages sent to the mother on 13 January 2019, the male friend who gave oral evidence on her behalf had suggested that, in any approach on her part to the Rabbinical Court in London, she should "play the game"; should dress modestly; should pretend that she was religious; and should express fear that the father would kidnap the child. He had also suggested that she should offer the father greater contact with the child than she genuinely intended to afford to him in order to induce him to give her a Jewish "get". Indeed it was on the day following her receipt of these messages that the mother had alleged to the police that the father intended to kidnap the child.

12. The judge was fully entitled to observe that, in the light of the above material, he should approach the mother's allegations of domestic abuse with caution. He then evaluated them in accordance with the approach recommended for Convention cases in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144. He therefore heard no oral evidence in relation to them and made no findings about them. Instead he sought to make a reasonable assumption about the maximum level of risk to the child in the light of all the available evidence. On this basis his assumption was of some risk to the mother, but not directly to the child, of physical and verbal abuse on the part of the father. The judge then addressed a series of undertakings offered to him by the father, including not to molest the mother in Israel, not to remove the child from her care in Israel without an order of the Israeli court and to provide reasonable financial support for both of them there until that court might otherwise order. The judge's conclusion was that, in the light of the undertakings, the risk to the child, if returned to Israel, did not reach the level of gravity required by article 13(b). So that defence failed. The judge did not consider, because he was not asked to consider, whether the undertakings would be enforceable against the father in Israel. The Court of Appeal's view, however, was that the judge would have been unlikely to have overlooked the well-recognised concern about the enforceability in a foreign state of undertakings given to the English court.

13. Then the judge turned to the discretion whether to order the child's return to Israel, to which his finding that the father had consented to her removal from Israel appeared to him to have given rise. In this regard he reminded himself that he was entitled to have regard to the policy aims of the Convention. He regarded them as based on

> "the recognition that it is of manifest benefit to a child to have decisions regarding their welfare taken in the jurisdiction of their habitual residence."

The judge surveyed the multitude of features which connected the child to Israel and, by contrast, her connection with the UK for less than five months prior to the hearing; and he concluded that he should not exercise his discretion to decline to order her return to Israel.

14. It was by those steps that the judge's order for the child's return to Israel was made under the Convention.

15. But then the judge added a postscript. It was based on passing observations which he had made earlier. He had there reminded himself that, under article 18 of the Convention, its provisions for the return of children did not limit the domestic

powers of a contracting state to order their return at any time; and he had referred to the decision of this court in *In re L (A Child) (Custody: Habitual Residence)* [2013] UKSC 75, [2014] AC 1017 ("the *L* case"), as for which see para 43 below. His postscript was:

> "As I have made clear above, I am satisfied that had I concluded that [the child] was habitually resident in this country, I would have reached the same decision under the inherent jurisdiction …"

16. The father had issued no application for an order for the child's return to Israel to be made under the inherent jurisdiction. Indeed no reference had been made to that jurisdiction in the course of the hearing, whether by counsel for either party in the course of their written or oral submissions to the court or by the judge himself.

17. No doubt many judges (at any rate I speak for myself) have occasionally been guilty of including in judgments ill-considered, off-the-cuff, remarks which later prove highly unfortunate.

18. The counterfactual hypothesis of the judge's postscript was that the child had been habitually resident in England on 10 January 2019, with the result that the Convention would, for that reason alone, not have applied to a retention on that date. But, apart from the wider principles applicable to the making of an order under the inherent jurisdiction addressed below, the hypothesis of the child's habitual residence in England should by itself have generated substantial questions, never addressed by the judge, about the propriety of such an order. One question would of course have surrounded recognition of the fact that (to use the judge's own words quoted in para 13 above)

> "it is of manifest benefit to a child to have decisions regarding their welfare taken in the jurisdiction of their habitual residence."

Judgment of the Court of Appeal

19. On 18 June 2019 the Court of Appeal (Flaux, Moylan and Haddon-Cave LJJ) not only heard the mother's appeal but determined it, by a judgment delivered by Moylan LJ with which the other members of the court agreed: [2019] EWCA Civ 1065, [2019] 3 FCR 49. The court's order is however dated 24 June 2019.

20. There is no need to consider in detail the court's reasons for setting aside the judge's order under the Convention. They will already be apparent in any event. In summary the court held that there had been no focus in the judgment on the father's foundational assertion that there had been a wrongful retention of the child by the mother on 10 January 2019; and it held that, once the judge had found that there was no agreement between the parties to return to Israel if the marriage broke down, there was no ground for concluding that the mother's retention of the child in England on and after that date had been wrongful. Therefore the Convention had not been engaged.

21. There is, by contrast, every need to consider in detail the court's reasons for substituting an order for the child's return to Israel under the inherent jurisdiction.

22. In this regard the court in para 63 identified the following two issues:

> "(i) whether the mother was prejudiced by the absence of any … application [for the exercise of the inherent jurisdiction] and by the other matters relied on by her so as to make the *judge's determination* unfair; and
>
> (ii) whether *the judge* was in a position to make a sufficient welfare assessment necessary to the proper exercise of the inherent jurisdiction." (Emphasis supplied)

23. It is worthwhile to note the court's use of the word "determination" in its formulation of the first issue. In at least six places in the judgment the court referred to the judge's "determination" or "decision" to make an order under the inherent jurisdiction. The court well knew that he had made no such determination or decision but it clearly regarded it as appropriate to deem him to have done so. In what follows, however, it is as well to remember that the order under the inherent jurisdiction was made not by the judge on 17 April 2019 but by the Court of Appeal on 18 June 2019. This leads to the second issue identified by that court. If the Court of Appeal, always invested with the powers of the judge against whose judgment an appeal is brought and thus in this case invested with his inherent jurisdiction, was considering whether to make a fresh order on a different basis, it had to survey the relevant evidence for itself; indeed, as is agreed between the parties, it had to satisfy itself that the evidence was sufficiently up-to-date to form the basis of an order which could be made that day by reference to circumstances which then existed. On the contrary, however, in its formulation of the second issue, the court asked whether the *judge* had been in a position to make the requisite welfare assessment.

24. Central to the mother's objections in the Court of Appeal to the making of any order under the inherent jurisdiction was a contention that the court's exercise of that jurisdiction had to be conducted by reference to an overarching consideration, namely the paramountcy of the child's welfare, entirely different from the considerations by reference to which the jurisdiction under the Convention would fall to be exercised. The Court of Appeal's answer was to rely on the judge's analysis of the discretion not to make an order under the Convention which, however mistakenly, he had considered to have arisen from the father's consent to the child's removal from Israel. In the judgment the Court of Appeal reasoned as follows:

> "65. … there were no additional matters of substance which would not be relevant to the exercise of that discretion but would be relevant to the discretion under the inherent jurisdiction.
>
> …
>
> 66. … it could be argued that the inherent jurisdiction has a wider canvas based, as it is, on welfare being the court's paramount consideration but, when the court is deciding whether to exercise its discretion to make a return order under the 1980 Convention once a ground for opposing the return has been established, the court will consider the wider canvas, in particular when the ground is other than grave harm."

25. The Court of Appeal's resolution of the two issues set out in para 22 above was therefore as follows, at para 68:

> "(i) the mother was not significantly prejudiced in this case so as to make the *judge's determination* unfair; and
>
> (ii) *the judge* was in a position to make a sufficient welfare assessment." (Emphasis supplied)

Their resolution led to the court's overall conclusion as follows, at para 73(c):

> "*The judge* was entitled to make an order for [the child's] return under the court's inherent jurisdiction and his summary welfare *decision* to do so is fully supported by the reasons he gave." (Emphasis supplied)

Inherent Jurisdiction Available

26. The first basis of the mother's assault on the Court of Appeal's summary order for the child's return to Israel under the inherent jurisdiction is that it was not open to that court, and would not have been open to the trial judge, to deploy the inherent jurisdiction in that way. Her case is that a summary order for the child's return outside the Convention could have been made only as a specific issue order under the Children Act 1989 ("the 1989 Act").

27. Section 10 of the 1989 Act empowers the court to make the orders specified in section 8(1). They include a specific issue order, there defined as "an order giving directions for the purpose of determining a specific question which has arisen … in connection with any aspect of parental responsibility for a child". An order for the return of a child to a foreign state falls within that definition; and a specific issue order to that effect can be made not only after a full inquiry into the merits of the case but also on a summary basis; see paras 34 and 35 below.

28. Had it been otherwise appropriate for the Court of Appeal to make a summary order in the circumstances of the present case, it could have been made as a specific issue order. There would have been jurisdiction to make such an order in relation to this child. For, had the child remained habitually resident in Israel on the date when, in the absence of an application, the court was considering whether to make the order (18 June 2019), her presence in England and Wales, coupled with the absence of her habitual residence in any part of the United Kingdom, would have endowed the court with jurisdiction to make it: sections 2(1)(b)(ii) and 3(1)(b) of the Family Law Act 1986 ("the 1986 Act"). If, alternatively, the child had become habitually resident in England by that date, article 8(1) of Council Regulation (EC) No 2201/2003 ("Regulation B2R"), which applies even when the other possible jurisdiction is not a member state as there defined, would, as confirmed by section 2(1)(a) of the 1986 Act, have endowed the court with jurisdiction to make it.

29. But could a summary order for the child's return to Israel also have been made under the inherent jurisdiction? In principle the inherent jurisdiction was as fully available in relation to this child as was the jurisdiction to make a specific issue order. For, had she remained habitually resident in Israel on 18 June 2019, a summary order for the child's return there under the inherent jurisdiction, not being an order which "gives care of a child to any person", would have fallen neither within section 1(1)(d) of the 1986 Act nor otherwise within Part 1 of it; and the result would have been the application of the bases of jurisdiction under common law, including that of the child's presence in England. If, alternatively, she had become habitually resident in England by that date, article 8(1) of Regulation B2R would, as in the case of a specific issue order, have endowed the court with jurisdiction to deploy the inherent jurisdiction in relation to her.

30. The mother accepts that, prior to the advent of the 1989 Act, a summary order for the return of a child abroad could be made by the High Court in the exercise of its inherent jurisdiction. She reminds the court of the classic exposition of Buckley LJ in *In re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250. It is easy to forget that, before ordering the return of the child to Germany in that case, the High Court judge had conducted a full merits-based inquiry into what the child's welfare required. Strictly speaking, the remarks of Buckley LJ at pp 264-265 were therefore only passing observations. Nevertheless he there convincingly explained why an order under the inherent jurisdiction for a prompt return of children wrongly taken from a foreign state, in order that the courts there might determine their future, might well be in their best interests at that stage; and that a full investigation of the merits of the parental dispute in the English courts might be incompatible with them. These remarks formed the basis of a number of decisions in the following decade, beginning with that of *In re C (Minors) (Wardship: Jurisdiction)* [1978] Fam 105.

31. On 1 August 1986 the 1985 Act, to which the Convention was scheduled, came into force. It is a fair working assumption that application of the Convention will generally identify the circumstances in which it is, and is not, in the interests of a child to be the subject of a summary order for return to another contracting state. The court should look critically at any application for a summary order, whether as a specific issue order or as an order under the inherent jurisdiction, for the return to a contracting state of a child who as in the present case has been held not to be susceptible, or who would probably be held not to be susceptible, to the making of an order under the Convention. In her judgment in the Irish High Court in *KW v PW* [2016] IEHC 513, O'Hanlon J went further:

> "57. This Court finds that the inherent jurisdiction is not applicable in this case. The inherent jurisdiction exists to fill a lacuna in the law and there is no lacuna here. To use the inherent jurisdiction to make an order returning these children to Australia after holding that they are habitually resident in Ireland would be to circumnavigate the content and the principles of the Hague Convention."

One has considerable sympathy for the judge's approach; but I respectfully suggest that it would be better for our approach in England and Wales to be less categorical. For, as I will explain in para 53 below, the principles of the Convention are not constructed by reference to the paramountcy of the child's welfare and so we must recognise, as being at any rate a possibility, that a child's welfare will require a summary order for his return to a contracting state even when the Convention does not so operate as to require it.

32. On 14 October 1991 sections 8 and 10 of the 1989 Act came into force. It was, according to the mother, at this moment, which marked the advent of the specific issue order, that it became impermissible for a summary order for the child's return abroad to be made instead under the inherent jurisdiction.

33. The mother cites the decision of the appellate committee of the House of Lords in *Richards v Richards* [1984] AC 174. It held that, following an enactment in 1967 which conferred specific jurisdiction to order a spouse to leave the home, a court could no longer make such an order pursuant to its general jurisdiction to grant an injunction. Lord Hailsham of St Marylebone, Lord Chancellor, said at pp 199, 200:

> "… where, as here, Parliament has spelt out in considerable detail what must be done in a particular class of case it is not open to litigants to bypass the special Act, nor to the courts to disregard its provisions by resorting to the earlier procedure, and thus choose to apply a different jurisprudence from that which the Act prescribes."

Lord Brandon of Oakbrook spoke at p 221 to similar effect.

34. The mother also relies heavily on the decision of the appellate committee in *In re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80. The issue was whether, as his father contended, there should be a summary order for the return of a five-year-old boy to Saudi Arabia, which was not (and is not) a contracting state under the Convention. The committee set aside the summary order made by the Court of Appeal and restored the order by which the judge had refused to make it. Baroness Hale of Richmond made the only substantive speech. She observed at para 5 that, had the Convention applied, the mother's retention of the boy in England would probably have been categorised as wrongful. She said at para 28:

> "It is plain, therefore, that there is always a choice to be made. Summary return should not be the automatic reaction to any and every unauthorised taking or keeping a child from his home country. On the other hand, summary return may very well be in the best interests of the individual child."

In concluding that the Court of Appeal had not been entitled to interfere with the judge's order, Baroness Hale referred at paras 39, 40 and 46 not only to the relevance of the effect of an order for the child's return on his primary carer but also to the

occasional relevance of differences in the criteria applied by the rival courts to resolution of the substantive issues in relation to the child and, in particular, to any absence of a power in the foreign court to authorise the primary carer to relocate with the child back to England.

35. The decision in *In re J* was, says the mother, impeccable. And her point is this: the application by the father under consideration in all three courts was for a specific issue order for the child's return to Saudi Arabia, not for an order to that effect under the inherent jurisdiction. It was thus in relation to a specific issue order that, for example, Baroness Hale stressed the facility in principle for an order for return to be made summarily.

36. We now reach the high-point of the mother's case that the inherent jurisdiction is no longer available for the making of a summary order for a child's return abroad. It is Practice Direction 12D, which supplements Chapter 5 of Part 12 of the Family Procedure Rules 2010 ("the 2010 Rules") and which is entitled "Inherent Jurisdiction … Proceedings". Paragraph 1.2 emphasises the width of the jurisdiction:

> "The court may under its inherent jurisdiction, in addition to all of the orders which can be made in family proceedings, make a wide range of injunctions for the child's protection of which the following are the most common -
>
> …
>
> (e) orders for the return of children to and from another state."

For the purpose of the 2010 Rules, the phrase "family proceedings" has the broad meaning ascribed to it by section 75(3) of the Courts Act 2003 ("the 2003 Act"). But the mother's case focusses on para 1.1 of the Practice Direction which provides:

> "It is the duty of the court under its inherent jurisdiction to ensure that a child who is the subject of proceedings is protected and properly taken care of. The court may in exercising its inherent jurisdiction make any order or determine any issue in respect of a child unless limited by case law or statute. *Such proceedings should not be commenced unless it is clear that the issues concerning the child cannot be resolved under the Children Act 1989*." (Emphasis supplied)

37. An application for a specific issue order for the return of a child to a foreign state cannot be issued in the High Court. It has to be issued in the Family Court: rule 5.4(1) of the 2010 Rules. It can then, however, be allocated to be heard by a judge of High Court level sitting as a judge of the Family Court or it can indeed be transferred to the High Court. There are strong reasons of policy, applied to all areas of civil justice, to confine claims to the lowest court which has jurisdiction to hear them in order to preserve the ability of the higher courts, in particular the High Court, to address only the claims strictly identified as deserving their attention. Is the italicised instruction in para 1.1 of the Practice Direction nevertheless too categorical? Does it have to be clear that the issues *cannot* be resolved under the 1989 Act before the inherent jurisdiction can be invoked?

38. The 2010 Rules are made pursuant to section 75(1) of the 2003 Act and so have legislative force. But practice directions, even including those which are stated to supplement the 2010 Rules, are not made pursuant to that or any other statutory authority. As Brooke LJ said in *U v Liverpool City Council (Practice Note)* [2005] EWCA Civ 475, [2005] 1 WLR 2657, at para 48:

> "… a practice direction has no legislative force. Practice directions provide invaluable guidance to matters of practice in the civil courts, but in so far as they contain statements of the law which are wrong they carry no authority at all."

39. The question therefore is whether the categorical instruction in para 1.1 of Practice Direction 12D is wrong.

40. One of the major achievements of the 1989 Act was to streamline the procedure for ordering a child to be placed in the care of a local authority. One of the former procedures for doing so had been by way of exercise by the High Court of its inherent jurisdiction. Section 100 of the 1989 Act provides:

> "(2) No court shall exercise the High Court's inherent jurisdiction with respect to children -
>
> (a) so as to require a child to be placed in the care of a local authority;"

What is significant is that, in making the 1989 Act, Parliament, by contrast, nowhere sought to preclude exercise of the inherent jurisdiction so as to make orders equivalent to those for which sections 8 and 10 of it provide, including specific issue orders.

41. In the absence of any statutory provision which the instruction in para 1.1 of Practice Direction 12D could be said to reflect, the court should turn to consider case law.

42. In *A v A (Children: Habitual Residence)* [2013] UKSC 60, [2014] AC 1, the trial judge had invoked the inherent jurisdiction to make a summary order of the obverse kind, namely for the return of four children from abroad, specifically from Pakistan, to England and Wales. By the time of the arrival of the case in the Supreme Court, the issue surrounded only the order in relation to the youngest child, who was a British national but who had been born in Pakistan and, unlike his siblings, had never lived or even been present in England. The majority of this court expressed doubt as to whether in these circumstances the trial judge had been right to ascribe to him habitual residence in England. But it perceived a different basis for the possible exercise of the inherent jurisdiction in relation to him, namely the basis at common law of his British nationality; and it remitted the case to the judge to determine whether it was appropriate to exercise it. In that a specific issue order cannot be made on the basis only of nationality, it could be said that the decision in the *A* case does not carry the present inquiry much further. It is however worthwhile to note that, at para 26 of her judgment, Baroness Hale rejected the submission that the judge's order, based on the child's perceived habitual residence, had been a specific issue order and observed that there were many orders relating to children which could be made either under the 1989 Act or under the inherent jurisdiction.

43. In the *L* case, cited in para 15 above, the mother brought a boy, then aged seven, from Texas to England with the permission of a federal court. A year later a federal appeal court reversed the trial court's ruling; and the latter then made a revised order for the mother to return the boy to Texas. The father thereupon applied to the High Court for an order under the Convention and alternatively under the inherent jurisdiction for the boy's return to Texas. On appeal this court held that the trial judge had been entitled to find that, by the time of the revised order made by the trial court, the boy had acquired habitual residence in England; and that therefore the mother's retention of him had not been wrongful and that the application under the Convention failed. Nevertheless this court proceeded to hold that in all the circumstances the boy's welfare required a summary order to be made under the inherent jurisdiction for his return to Texas. In that the child was habitually resident in England, there is no doubt that his return to Texas could equally have been made the subject of a specific issue order. But it was not made the subject of such an order; and it was never suggested that it should have been so made.

44. The instruction in para 1.1 of Practice Direction 12D goes too far. There is no law which precludes the commencement of an application under the inherent jurisdiction unless the issue "cannot" be resolved under the 1989 Act. Some applications, such as for a summary order for the return of a child to a foreign state, can be commenced in the High Court as an application for the exercise of the

inherent jurisdiction. But then, if the issue could have been determined under the 1989 Act as, for example, an application for a specific issue order, the policy reasons to which I have referred will need to be addressed. At the first hearing for directions the judge will need to be persuaded that, exceptionally, it was reasonable for the applicant to attempt to invoke the inherent jurisdiction. It may be that, for example, for reasons of urgency, of complexity or of the need for particular judicial expertise in the determination of a cross-border issue, the judge may be persuaded that the attempted invocation of the inherent jurisdiction was reasonable and that the application should proceed. Sometimes, however, she or he will decline to hear the application on the basis that the issue could satisfactorily be determined under the 1989 Act.

45. Why has the mother been so concerned to argue that the Court of Appeal's consideration of the making of a summary order for the child's return to Israel needed to take place within the framework of a specific issue order?

46. The answer is that, although the child's welfare is the paramount consideration in the making of such an order whether made under the inherent jurisdiction or as a specific issue order, the mother considers that a specific issue order could be made only following a more extensive inquiry into the child's welfare.

47. Where an application for the same order can be made in two different proceedings and falls to be determined by reference to the same overarching principle of the child's welfare, it would be wrong for the substantive inquiry to be conducted in a significantly different way in each of the proceedings.

48. Of course, when in each of the proceedings it is considering whether to make a summary order, the court will initially examine whether the child's welfare requires it to conduct the extensive inquiry into certain matters which it would ordinarily conduct. Again, however, it would be wrong for that initial decision to be reached in a significantly different way in each of them.

49. The mother refers to the list of seven specific aspects of a child's welfare, known as the welfare check-list, to which a court is required by section 1(3) of the 1989 Act to have particular regard. She points out, however, that, by subsections (3) and (4), the check-list expressly applies only to the making of certain orders under the 1989 Act, including a specific issue order, as is confirmed by the seventh specific aspect, namely the range of powers under that Act. The first six specified aspects of a child's welfare are therefore not expressly applicable to the making of an order under the inherent jurisdiction. But their utility in any analysis of a child's welfare has been recognised for nearly 30 years. In its determination of an application under

the inherent jurisdiction governed by consideration of a child's welfare, the court is likely to find it appropriate to consider the first six aspects of welfare specified in section 1(3) (see *In re S (A Child) (Abduction: Hearing the Child)* [2014] EWCA Civ 1557, [2015] Fam 263, at para 22(iv), Ryder LJ); and, if it is considering whether to make a summary order, it will initially examine whether, in order sufficiently to identify what the child's welfare requires, it should conduct an inquiry into any or all of those aspects and, if so, how extensive that inquiry should be.

50. The mother also refers to Practice Direction 12J, which supplements Part 12 of the 2010 Rules and which is entitled "Child Arrangements and Contact Orders: Domestic Abuse and Harm". By para 4, the Practice Direction explains that harm is suffered not only by children who are the direct victims of domestic abuse but also by children who live in a home in which it is perpetrated. When disputed allegations of domestic abuse are made, the Practice Direction makes detailed requirements of the court, in particular to consider whether to conduct a fact-finding hearing in relation to them (para 16), whether to direct the preparation of a report by a CAFCASS officer (para 21) and whether to order a child to be made a party and be separately represented (para 24). The mother points out, however, that, by para 1, the Practice Direction applies only to proceedings under the relevant parts of the 1989 Act (which would include an application for a specific issue order) or of the Adoption and Children Act 2002. Therefore it does not expressly apply to the determination of any application under the inherent jurisdiction, including of an application governed by consideration of a child's welfare in which disputed allegations of domestic abuse are made. Nevertheless, as in relation to the welfare check-list, a court which determines such an application is likely to find it helpful to consider the requirements of the Practice Direction; and if it is considering whether to make a summary order, it will initially examine whether, in order sufficiently to identify what the child's welfare requires, it should, in the light of the Practice Direction, conduct an inquiry into the allegations and, if so, how extensive that inquiry should be.

Exercise of Inherent Jurisdiction Flawed

51. The Court of Appeal did not conduct for itself an inquiry into whether the welfare of the child required her to be the subject of a summary order for return to Israel. It considered that the judge had conducted such an inquiry and had determined that her welfare did so require; and it held that his perceived determination was not wrong.

52. With great respect, I find it impossible to agree that the judge had conducted any such inquiry or had made any such determination. The judge had not purported to make any determination at all under the inherent jurisdiction; and he had not conducted any inquiry in relation to which the child's welfare was the paramount

consideration; still less had he conducted what was commended by the Court of Appeal as a "sufficient welfare assessment".

53. The Court of Appeal held that, in determining not to exercise the discretion so as to decline to order the child's return to Israel, which he perceived to have arisen under the Convention, the judge had considered the "wider canvas based … on welfare being the court's paramount consideration". But the discretion which arises under the Convention lacks that basis. It has been best explained by Baroness Hale in *In re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] AC 1288 as follows:

> "42. In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states.
>
> 43. My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare."

The judge's determination not to exercise the discretion perceived to have arisen under the Convention cannot stand as a determination that the child's welfare required her return to Israel.

54. The initial question for the Court of Appeal was whether the mother had had sufficient notice of its intention to make a summary order under the inherent jurisdiction. The fact that the father had not applied for an order under the inherent jurisdiction did not, of itself, inhibit the Court of Appeal from making the order; and, had the judge made such an order, the absence of an application would not, of itself, have inhibited him from doing so. Section 10(1)(b) of the 1989 Act provides that a specific issue order can be made even though no application for it has been made; and there is no reason to doubt that an order under the inherent jurisdiction, the flexibility of which is a key feature of it, can also be made of the court's own

motion. But in such circumstances a heavy duty lies upon a court to ask whether the effective respondent has had notice of the court's intention sufficient to afford to her (or him) a reasonable opportunity to mount opposition to it. In the present case the Court of Appeal did address this initial question; and it answered it affirmatively. It is correct that, upon her receipt of the father's skeleton argument three weeks prior to the hearing in the Court of Appeal, the mother became aware that, in the event of the success of her appeal against the order under the Convention, the father aspired to persuade that court to make an order under the inherent jurisdiction; and respect must be given to the Court of Appeal's observation that Mr Twomey QC, on behalf of the mother, had at its hearing (unlike at ours) struggled to identify any additional evidence which he might have adduced, or submission which he might have made, had such notice been given to him prior to the conclusion of the hearing before the judge. But, since it was the Court of Appeal which made the order, the real question was whether the mother had had sufficient notice of the intention of that court to do so. It is sufficient to record significant doubt whether the mother could reasonably have anticipated that, in the event of the success of her appeal, an appellate court, instead of, at most, remitting to the judge consideration of the exercise of the inherent jurisdiction, would itself exercise it even in the absence of material with which to analyse what the child's welfare required.

55. I respectfully suggest, however, that, before making a summary order under the inherent jurisdiction for this child to be returned to Israel, the Court of Appeal should have given (but did not give) at least some consideration to eight further, linked, questions.

56. First, the court, which was sitting on 18 June 2019, should have considered whether the evidence before it was sufficiently up to date to enable it then to make the summary order. The mother's statement in answer to the claim under the Convention was dated 29 March 2019. In it she had devoted seven out of 67 paragraphs to assertions of the child's habitual residence in England and of particular circumstances said to demonstrate how happy and settled she had become. In his statement in reply dated 11 April the father had joined issue with the mother's assertions. The oral evidence given by the parties to the judge on 15 April had been limited to the issue of consent to the child's removal from Israel and so had not addressed these matters.

57. Second, the court should have considered whether the judge had made, or whether it could make, findings sufficient to justify the summary order. The only relevant finding made by the judge had been that on 10 January 2019, only seven weeks after her arrival in England, the child had retained habitual residence in Israel. Was that sufficient to justify the making of a summary order five months later? In the light of the policy in favour of the making of substantive welfare determinations by the courts of habitual residence, did there need to be inquiry into the child's

habitual residence at the relevant date, which, in the absence of an application, was in this case the date of the proposed order?

58. Third, the court should have considered whether, in order sufficiently to identify what the child's welfare required for the purposes of a summary order, an inquiry should be conducted into any or all of the aspects of welfare specified in section 1(3) of the 1989 Act and, if so, how extensive that inquiry should be: see para 49 above. It might in particular have considered that the third of those aspects, namely "the likely effect on [the child] of any change in [her] circumstances", merited inquiry.

59. Fourth, the court should have considered whether in the light of Practice Direction 12J, an inquiry should be conducted into the disputed allegations made by the mother of domestic abuse and, if so, how extensive that inquiry should be: see para 50 above. The judge had made no findings about them. Instead, in accordance with the *E* case cited in para 12 above, he had, for the purposes of the claim under the Convention, made a reasonable assumption in relation to the maximum level of risk to the child arising out of any domestic abuse to be perpetrated by the father and had considered that such risk would be contained within acceptable limits by undertakings offered by the father, the enforceability of which in Israel the judge had not explored. Consideration should therefore have been given to whether, in a determination to be governed by the child's welfare, the judge's approach to the mother's allegations remained sufficient.

60. Fifth, the court should have considered whether, without identification in evidence of any arrangements for the child in Israel, in particular of where she and the mother would live, it would be appropriate to conclude that her welfare required her to return there.

61. Sixth, the court should have considered whether, in the light of its consideration of the five matters identified above, any oral evidence should be given by the parties and, if so, upon what aspects and to what extent.

62. Seventh, the court should have considered whether, in the light of its consideration of the same matters, a CAFCASS officer should be directed to prepare a report and, if so, upon what aspects and to what extent. It is noteworthy that in the *L* case discussed in para 43 above, a CAFCASS report had been prepared. It had been designed to ascertain the boy's wishes and feelings and so was apparently made as if pursuant to section 1(3)(a) of the 1989 Act: see para 14 of Baroness Hale's judgment. In her careful weighing, in paras 34 to 37 of her judgment, of the welfare considerations which militated both in favour of, and against, the boy's return to

Texas, Baroness Hale relied to a significant extent upon the content of the CAFCASS report.

63. Eighth, the court should have considered whether it needed to compare the relative abilities of the Rabbinical Court in Jerusalem and the Family Court in London to reach a swift resolution of the substantive issues between the parents in relation to the child and to satisfy itself that the Rabbinical Court had power to authorise the mother to relocate with the child back to England: see para 34 above.

64. The effect of the above is not to submerge efficient exercise of the inherent jurisdiction to make a summary order within an ocean of onerous judicial obligations. The linked obligations are obligations only to *consider* the eight specified matters. There is no need for us to contemplate what the proper outcome of the Court of Appeal's consideration of them might have been. It is the fact that it failed even to consider them which yields the conclusion that it conducted no defensible analysis of the child's welfare prior to its determination to make the summary order and which led this court to uphold the mother's appeal.