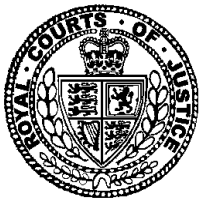

Neutral Citation Number: [2024] EWHC 2834 (Fam)

Case No: FD23P00148

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 November 2024

Before:

SIR ANDREW MCFARLANE PRESIDENT OF THE FAMILY DIVISION

RE: A & B (Separate Representation)

Mr Richard Harrison KC and Mr James Mulholland (instructed by Creighton and Partners) for the Applicant Father
Mr Mark Jarman KC and Ms Indu Kumar (instructed by Wilson Solicitors LLP) for the First Respondent Mother
Mr Jamie Niven-Phillips, Solicitor of Cafcass Legal for the Second and Third Respondents (by their Children's Guardian, Ms Allison Baker)
Mr Christopher Hames KC (instructed by Ms Nina Hansen of Freemans Solicitors on behalf of the Children directly)

Hearing date: 1 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir Andrew McFarlane P:

1. On 28th June 2024 the court [Sir Andrew McFarlane P and Upper Tribunal Judge Mandalia] handed down judgment at the conclusion of proceedings under the Hague International Child Abduction Convention ordering the return of two children to the USA, A and B. On 22nd August 2024, Moylan LJ refused an application by the children's mother for permission to appeal. Unfortunately, the parents have been unable to agree the terms of a final order and the case was relisted on 1st November 2024 to resolve these outstanding issues. On 23rd October, solicitors instructed directly by the children issued an application (a) seeking permission for the children to be represented separately from their current CAFCASS guardian and (b) for the final decision made on 28 June to be set aside 'due to a change in the children's circumstances'. In the event, the application for separate representation was also listed on 1st November and was heard before, and, as a result of the time that it took, instead of, the father's application to fix the terms of the final order. The purpose of this judgment is to determine the children's application for separate representation.

2. The factual background is fully set out in the judgment of 28 June – Re HR (Parallel Child Abduction and Asylum Proceedings) [2024] EWHC 1626 (Fam). The children, A and B, are now aged 12 and 10 years. Like their parents, they are American and had no previous connection with the United Kingdom before they arrived in England with their mother on 4 August 2022. On arrival, the mother claimed asylum for herself and the children. On 25 March 2024, the First Tier Tribunal [FtT] dismissed the mother's claims and her subsequent attempts to appeal that decision failed. Subsequently, in its June 2024 judgment, this court held that the father's application under the Hague Convention, which he had made in March 2023, must succeed. The mother admitted that she had wrongfully removed the children from the USA and the court dismissed her case under both Art 13(b) of the Hague Convention and her case based upon the children's objections. The two children had been joined as parties to the Hague proceedings at an early stage, in accordance with guidance, solely because there were parallel asylum proceedings. They were represented by a guardian and a legal team at the Hague final hearing.

3. At the centre of this case is the mother's sustained assertion that her sons have been sexually and physically abused by their father. These assertions were investigated by the authorities in the US and, on 6 July 2022, following a one-day hearing in the Court of Common Pleas in Delaware County, Judge Love held that the allegations made against the father were not proved. The mother immediately made a fresh referral, repeating the allegations, to the local social services who, following a further investigation, informed her that the allegations were 'unfounded'. The mother then removed the children to the UK.

4. The allegations of abuse made by the mother and the children were again investigated within the FtT proceedings in this jurisdiction. The FtT was not persuaded, even on the lower standard of proof that it adopted, that the allegations made by the mother and the boys were reliable and the tribunal did not accept that the children had been abused by their father.

5. At the start of the June hearing, Mr Mark Jarman KC, counsel for the mother, applied for an adjournment so that the children might meet with Ms Nina Hansen, a most experienced solicitor, with a view to an assessment of their capacity to be separately

represented in the final hearing of the Hague Convention proceedings. For the reasons recorded in our judgment [paragraphs 18 to 21] we dismissed that application and the hearing proceeded with the children's interests continuing to be represented by Ms Baker, a CAFCASS guardian, Mr Niven-Phillips (CAFCASS Legal) and counsel.

6. In our judgment, we described our approach to the clear objections that each of the boys was making to returning to the USA at paragraph 67:

> '67. In approaching the exercise of our discretion whether or not to order the children's return to the US, despite their very clear objection to that outcome, we have taken account of all the circumstances and in particular:
>
> i) The children's views are firmly based upon the narrative that their father has abused them and is an altogether malign individual. The allegations that underly that narrative have been investigated by the CYS on a number of occasions, the US Family Court and the FtT. Each of these bodies has found that the evidence fails to support the allegations and that they are unfounded or unproved (even, in the FtT, on a lower standard of proof). Although we accept that the children's subjective view are firmly held, the weight to be attached to the children's objections that are based upon an unfounded narrative, in this case, must be substantially reduced.
>
> ii) Whilst not being in a position to make any findings, and expressly not doing so, the prospect that the children's views of their father may have been generated by alienating behaviour on the part of their mother and that they have thereby suffered harm requires serious and detailed consideration, as does the prospect of the children being reintroduced to their father. In terms of the policy of the convention these matters are for the court in the children's home state but, more importantly in this case, the involvement of the father can realistically only be achieved if they are back in the US.
>
> iii) The children are American and have no ties or connection with the UK.
>
> iv) In the UK the mother and children will continue to live in very straitened accommodation on a basic subsistence allowance until, at some stage, they may be removed back to the US in any event, because they have no lawful basis to remain in the UK.
>
> v) It is the guardian's professional view that it is in the children's best interests to be returned to the US.
>
> vi) The current situation has been entirely generated by the belief of the children's mother that the children have been abused by their father. There is no credible evidential basis for this belief, yet the children were abducted, in breach of orders of the US court, and have been kept, initially secretly, in the UK because of the mother's belief. There is a strong policy ground based on comity between member states and the father's application.
>
> 68. In all the circumstances, and notwithstanding the children's objections, we take the clear view that both A and B must be summarily returned to the USA.'

7. In her application for permission to appeal, the mother's first ground of appeal asserted that the decision not to permit the children to be seen by an independent solicitor 'prevented the voice of the children being heard or properly articulated'. In refusing permission to appeal, Moylan LJ held that there was no need for the children to be separately represented in order for their voice to be heard. He held, on the contrary, that the judgment demonstrated that their voice had been very clearly heard and very clearly articulated.

8. The application now made by Ms Hansen on behalf of the children is supported by a witness statement, which is to be read alongside an earlier witness statement made for the Court of Appeal process. Those two statements include the following important information:

    a) On 1 July, the two children were brought to Ms Hansen's offices by two friends of their mother. This visit was 'unannounced', and Ms Hansen arranged to meet them two days later. Ms Hansen had not had any previous involvement in, or knowledge of, the proceedings other than to have taken a call on an earlier date from the mother's solicitor enquiring whether she might have capacity to take on the representation of the children;

    b) On 3 July, Ms Hansen had a full discussion with the boys. She formed the view that A was thoughtful and intelligent and had a good understanding of the case, she thought that both boys were potentially competent, but she had yet to read the case papers (other than the judgment) and therefore arranged to meet them again;

    c) At the further meeting, on 1 August, by which time Ms Hansen had seen the immigration papers but not those in the Hague proceedings, she asked the boys in detail about the hearing before Judge Love and they described what they regarded as a very traumatic experience. Ms Hansen considered that B, the younger boy, was highly intelligent and that 'he may be competent or at least on the cusp of competency';

    d) Shortly before 2 September, Ms Hansen received a message from A in which he expressed suicidal ideation over the prospect of having to return to the USA. Although she was on leave, Ms Hansen arranged through her office to meet the boys over a Zoom link. The boys knew that their mother's application for permission to appeal had been refused and Ms Hansen was able to explain to them the likely sequence that the proceedings would then follow around the implementation of the court's order. She arranged to meet them again once the date of the next hearing was known;

    e) The final meeting took place on 11 October. Ms Hansen describes the boys as seeming 'very different' on that occasion: 'older, more mature, happier';

    f) Ms Hansen, who is alive to the potential for the boys to be influenced in their views by their mother, conducted an in-depth conversation with them about their circumstances and the court proceedings in particular.

9. By the conclusion of her final meeting with the children, Ms Hansen formed the opinion that the older boy, A, had sufficient maturity and understanding to be able to give instructions directly to a lawyer in the proceedings. Her opinion regarding B was that he was 'growing into competency'. During the hearing, Ms Hansen confirmed through her counsel, Mr Christopher Hames KC, that, if B were the only child in the proceedings, she would not yet consider him to be competent (to use the shorthand) to give direct instructions.

10. In presenting the application on behalf of A and B, Mr Hames accepted that there will be concern that the children, in repeating allegations of sexual abuse against their father, have been influenced to do so by their mother, and that more generally the potential for their mother to have influenced their views is a live issue. Nonetheless, he submitted that, for child A, regardless of the source of his views, he has sufficient maturity, intelligence and understanding to give Ms Hansen instructions. As the children were already parties to the proceedings, the issue for the court was confined to that of representation. Mr Hames explained that, as the children did not have a live avenue of appeal against the June decision, 'the best hope for them is for the order to be set aside'. In those circumstances, Mr Hames accepted that the court would necessarily have to consider the prospects of the application to set aside succeeding.

11. Although the children are already a party, but to counter any suggestion that the court should now terminate their party status, Mr Hames submitted that there were now additional grounds that would justify party status (separate from the now defunct need to do so because of the asylum process). They are (as per FPR 2010, PD16A, para 7.2):

    i) The children's standpoint or interest is now inconsistent with or incapable of being represented by one of the adult parties;

    ii) The views and wishes of the children cannot adequately be represented by a report to the court; and

    iii) An older child is opposing a proposed course of action.

    Mr Hames relied upon *Re LC (Children) (No 2)* [2014] UKSC 1 where, at paragraph 45, Lord Wilson held that the decision whether or not to join a child as a party was fundamentally a 'best interests' determination.

12. Mr Hames' central submission is, therefore, that the court should not discharge the children as parties to the proceedings and, in the light of Ms Hansen's assessment, permission should be granted for both boys to give direct instructions to her as their solicitor.

13. Mr Hames, in common with each of the other advocates, submitted that the test to be adopted by a court determining an application to set aside a return decision in Hague Convention proceedings is a high one. The approach is that set out by Moylan LJ in *Re B (A Child: Abduction: Article 13(b)* [2020] EWCA Civ 1057 at paragraph 80 onwards:

    > '80. Although there is some jurisprudential history on the question of whether/when the court can set aside an order under the 1980 Convention, I do not think it is necessary to go back further than *Re W (Abduction: Setting Aside Return Order)* [2019] 1 FLR 400 in which I gave the lead judgment. This is not to elevate

this decision above the other, earlier, cases to which we were referred but because the insertion of r.12.52A into the FPR 2010 has resolved the question of whether there is jurisdiction to set aside such an order.

81. In *Re W,* I made the following observations: the first, in the context of whether the court has a set aside power:

> "[37] However, before considering those issues, it seems to me that there would be considerable advantages to the judge who made the final order being asked to determine whether the asserted change of circumstances justifies any reconsideration of the order and, if it does, whether it is of sufficient impact to justify a rehearing. I would express the test as being whether there has been a fundamental change of circumstances which sufficiently undermines the basis of the court's decision and order to require the application to be reheard."

My conclusions were as follows:

> "[66] In conclusion, my provisional view is that the High Court has power under the inherent jurisdiction to review and set aside a final order under the 1980 Hague Convention. This power can be exercised when there has been a fundamental change of circumstances which undermines the basis on which the original order was made. I set the bar this high because, otherwise, as Mr Devereux QC observed, there would clearly be a risk of a party seeking to take advantage of any change of circumstances such as a simple change of mind.
>
> [67] I would add that the re-opening of a final Hague order (whether for return or non-return) is likely to be a rare event indeed and that, as the process is a summary one, any application for such an order will necessarily have had to be filed without delay. Further, where an application for rehearing has been issued, the court will case-manage it tightly so that only those applications that have a sufficient prospect of success are allowed to proceed and then only within parameters determined by the court."

82. …

83. In *Re W* I proposed, what I described as, a "high" bar when the court is determining an application to set aside an order under the 1980 Convention, namely (I repeat) "a fundamental change of circumstances which undermines the basis on which the original order was made". This approach has been adopted, as part of the changes to the FPR 2010, in PD12F paragraph 4.1A, as set out below. That this approach has been adopted by the Family Procedure Rules Committee, fortifies my view that this is the right test when the court is deciding whether to set aside an order.'

14. Moylan LJ then set out FPR 2010, r 12.52A and PD12F, para 4.1A. It is not necessary to do more here than to highlight the following within para 4.1A:

> 'In rare circumstances, the court might also 'set aside' its own order where it has not made an error but where new information comes to light which fundamentally changes the basis on which the order was made. The threshold for the court to set aside its decision is high, and evidence will be required – not just assertions or allegations.'

15. Moylan LJ concluded his description of the law relating to set aside with this summary at paragraph 91:

> 'I would further emphasise that, because of the high threshold, the number of cases which merit any application to set aside are likely to be few in number. The court will clearly be astute to prevent what, in essence, are attempts to re-argue a case which has already been determined or attempts to frustrate the court's previous determination by taking steps designed to support or create an alleged change of circumstances.'

16. In his skeleton argument, Mr Hames addressed the high threshold on the following basis:

> 'Plainly the children will not be re-arguing the case as they have never argued a case before. In broad terms they will rely on the following as grounds for a material change of circumstances since their views were ascertained by the Children's Guardian nearly 14 months ago – on 19 September 2023:
>
> i) Both children not only object to a return but point blank refuse to return. They will refuse to board the plane;
>
> ii) [A] has told Ms Hansen that he has suicidal thoughts, particularly if he is compelled to return;
>
> iii) The children not only object to return to the USA because of their father's conduct but because there will inevitably be severe conflict and uncertainty;
>
> iv) The nature and force of their objections has materially changed;
>
> v) The children are over one year older and have settled in England for over one more year. [A] has settled well into secondary school;
>
> vi) The children have now been here, happily settled, for 2 years and 3 months.'

17. In his oral submissions, Mr Hames repeated the assertion that the previous judgment is undermined by 'a material change in circumstances'. Of the various factors listed, he submitted that the fact that the boys are now refusing to go to the USA is a change from the previous position which was that they were objecting to a return.

18. The children's application is supported by Mr Jarman on behalf of their mother, essentially upon the same basis as that put forward by Mr Hames for the children, but with the addition of reference to the likely arrangements for the children should they return to the US as it is no longer anticipated that they would be accommodated in foster

care on arrival. Mr Jarman submitted that, as a result, 'fundamentally there is a significant change in the landscape'.

19. The children's application is opposed by Mr Richard Harrison KC on behalf of their father. Despite Ms Hansen's acknowledged experience in these matters, Mr Harrison submits that her assessment lacks rigour, for example, it does not adumbrate the factors, for or against, her conclusion that A is competent to give instructions. With respect to B, Mr Harrison submits that if, as is the case, Ms Hansen does not consider that he is currently competent then that is the end of the matter, and she cannot accept direct instructions from him.

20. Mr Harrison invited the court to deal with the representation issue summarily and refuse it for the following reasons:

    i) The children are already represented by an experienced solicitor and guardian;

    ii) The Court has already considered the question of representation, as a preliminary issue on 11 June 2024. The grounds justifying refusal then remain largely valid. In particular, firstly, the children were only joined as there were concurrent asylum proceedings. Secondly the proceedings have already taken nearly two years and there is a pressing need to avoid delay. Thirdly the strength of the children's objections was already before the court in clear terms;

    iii) The decision not to afford the children separate representation was upheld by the Court of Appeal;

    iv) Ms Hansen's role as a solicitor-guardian would be confined to giving evidence setting out the children's views. There is nothing new in the wishes and feelings of the children as set out in the statement of Ms Hansen;

    v) The Court accepted the previous submission on behalf of the guardian that "*the children should be protected from harm by further professional intervention when not necessary for that step to be taken*.";

    vi) Whilst Ms Hansen comments that she was concerned about the mother's influence, there is a lack of analysis as to the potential for this to have affected the children and the impact it had on her assessment as to competence;

    vii) There is no indication that the children have any understanding as to their precarious immigration position whereby they and their mother could be required to leave the country at any time.

21. Mr Harrison submitted that the issues of separate representation and the proposed application for set aside are inextricably linked. He submitted that the set aside application had no prospect of success and, further, that it was contrary to the best interests of the children to be separately represented in the court proceedings – not least because of the further delay that would result. For the children to be drawn yet further into this dispute would, it was submitted, aggravate the harm that these 'exceptionally vulnerable children' are already suffering. As recorded in the June judgment at paragraph 64, it is the guardian's view that the children are not in possession of the

correct factual background, and their expressed wishes are neither independent nor authentic.

22. Mr Harrison referred the court to *Re CS (Appeal: Sufficiency of Child's Understanding)* [2019] EWHC 634 (Fam) where, at paragraph 64, Williams J set out a range of elements that should be considered when evaluating a child's ability to give direct instruction to a solicitor in Family proceedings:

> '[64] Thus, in determining whether the child has sufficient understanding to give instructions to pursue an appeal and to conduct the appeal, I need to consider a range of factors including:
>
> (i) The level of intelligence of the child.
>
> (ii) The emotional maturity of the child.
>
> (iii) Factors which might undermine their understanding such as issues arising from their emotional, psychological, psychiatric or emotional state.
>
> (iv) Their reasons for wishing to instruct a solicitor directly or to act without a guardian and the strength of feeling accompanying the wish to play a direct role.
>
> (v) Their understanding of the issues in the case and their desired outcome, any matter which sheds light on the extent to which those are authentically their own or are mere parroting of one parent's position. Some degree of influence is a natural component of decision-making but the closer to the 'parroting' end of the spectrum one gets the lower the level of understanding there is likely to be. An unwise decision does not mean the child does not understand although it will no doubt depend on the extent to which the child's view diverges from an objectively reasonable or wise decision.
>
> (vi) Their understanding of the process of litigation including the function of their lawyer, the role of the judge, the role they might play and the law that is applied and some of the consequences of involvement in litigation. Care should be taken not to impose too high a level of understanding in this regard; many adults with capacity would not and we should not expect it from children. An ability to understand that their solicitor put their case but also has duties of honesty to the court, an ability to understand that the judge makes a decision based on an overall evaluation of the best interests of the child which balances many competing factors; the ability to understand that they might attend court, could give evidence and could read documents; the ability to recognise the stress of exposure to the court process and the arguments between others. The presence of all of these would be powerful signs of a high level of understanding. Conversely the absence of them or evidence of a distorted understanding would be contra-indicators.
>
> (vii) The court's assessment of the risk of harm to the child of direct participation for the risk of harm arising from excluding the child from direct participation and the child's appreciation of the risks of harm.'

23. Mr Harrison, relying on *Re CS*, drew particular attention to the need to have regard to the children's emotional/psychological state and to the potential for parental influence

to compromise the child's ability to understand the issues in the case. He submitted that, even if A may be capable of giving instructions, he does not have a level of understanding sufficient to be represented directly in highly complex proceedings.

24. Finally, Mr Harrison's case is that there has not been a fundamental change in circumstances sufficient to undermine the basis of the court's decision in June. The court proceeded on the basis that the children had very strong objections to a return and the guardian reported that, over a year ago, A had said 'I don't want to go back; I'd rather kill myself' and that if the judge decided that he had to return to the US 'I would go home and kill myself'. Mr Harrison relied on those words not only to establish that recent reference by A to suicide was not a change, but also to demonstrate that what was being said then was just as much a 'refusal' as what he has said more recently and that that was known at the time of the court's decision.

25. Mr Jamie Niven-Phillips, on the instructions of the children's guardian Ms Baker, accepts that Ms Hansen's assessment of the children's current ability to give instructions is likely to carry more weight than their previous assessment made a year or so ago. They do not therefore challenge Ms Hansen's conclusions. Mr Niven-Phillips, whilst noting that Ms Hansen did not consider that B was clearly competent to instruct, submitted that, if A was competent and the position of both boys was a common one, then the threshold for assessing competence might be lower, thereby permitting B to do so alongside his brother. No authority was cited for this submission, which was not one that was made or supported by Mr Hames. Mr Niven-Phillips thus adopted an essentially neutral position on the issue of representation.

Application for separate representation: discussion and conclusion

26. A number of unusual features are in play with respect to this application, namely:

    a) It is being made after the proceedings have effectively been concluded and all that now remains is the drafting of the final return order;

    b) The only reason put forward for the children to be separately represented at this stage is so that they may make an application to set aside the decision made in June to order return to the USA and have a say in the implementation/fixing of the draft order;

    c) No other party, not even the children's mother, is applying for the June decision to be set aside;

    d) Whilst the children are already parties to the proceedings, and thus do not need to apply to be made parties in addition to the present representation application, the court has previously held that they were only joined because of the parallel asylum proceedings which have now concluded;

    e) The children, who live in a one-room apartment with their mother, are likely to have become enmeshed in her worldview which is based upon allegations of sexual and physical abuse of the children by their father which have been found to be unsubstantiated in proceedings in both the USA and UK.

27. In the circumstances, it is appropriate for a court determining the application for separate representation to have regard to:

    i) The prospects of success of the proposed application to set aside the June decision;

    ii) Whether the children would be afforded party status were they to be applying for that at this stage and/or whether their current status as parties should now be terminated;

    iii) The degree to which the children's ability to give independent instructions to a solicitor is likely to have been compromised by the degree to which they are enmeshed in their mother's views.

(a) Proposed set aside application: prospects of success

28. I have already made reference to the judgment of Moylan LJ in *Re B* and to r 12.52A and PD12F, para 4.1A which establish that the court will only exercise its jurisdiction to set aside a decision in Hague Convention proceedings if the basis of the original decision is undermined by a fundamental change of circumstances. In this regard, Mr Hames' description of the children's case for set aside fell well short of satisfying the high threshold that is required. The following three discrete points fall to be made before turning to the test itself:

    a) The court must be astute to prevent what, in essence, are attempts to re-argue the issue that has been determined. It is not right to side-step this important requirement by submitting, as Mr Hames did, that as the children had not argued the point at the first Hearing themselves they are not 're-arguing' it now. If the case now to be put by the children was previously argued by another party or parties and determined by the court, the court should prevent it being re-argued through a set aside application. The focus must be on the need for a fundamental change that undermines the court's decision;

    b) It is wrong, as the case for the children seeks to do, to measure the change in circumstances from the last time that the children were seen by their guardian. Any asserted change in circumstances is to be measured from the date of the court's decision in June 2024. Thus, the relevant period is five months and not over a year as submitted, and any asserted further settlement in the UK is to be evaluated against that five month yardstick;

    c) References to the children now being 'settled and happy' in the UK must be seen against the background of their precarious immigration status. They have no right to remain here and face imminent deportation to the US.

29. The submissions made on behalf of the children and of their mother each fall into error by only referring to the need to establish a change in circumstances. The first error relates to the quality and degree of change that is required, namely a 'fundamental change'. Whilst being conscious of the need not to be unduly concerned with semantics, it is the case that Mr Hames described his case as relying on there being 'a material

change in circumstances', whilst Mr Jarman referred to there being 'fundamentally a significant change in the landscape'. Each of these formulations falls short of contemplating a 'fundamental change'.

30. The second, and much more consequential error, is that the submissions made on behalf of both the children and their mother wholly failed to engage with the need to establish that such change as there may have been 'sufficiently undermines the basis of the court's decision and order to require the application to be reheard'. In this regard, Mr Harrison's reference to the evidence before the court in June is important. The strength of the children's objection to returning to the USA was front and centre before the court in June; it was, to a large degree, what the hearing was about. It was known that A had, over a year ago, spoken of killing himself should there be a return order. Against that background it is not the case that 'the nature and force of their objections has materially changed', as Mr Hames submits, let alone fundamentally changed so as to undermine the basis of the decision made in June. Indeed, for the children now to say that they will refuse to board a plane, is of a piece with the presentation of their wishes and feelings in June. Despite that being the case, the court determined that they must return to the USA. This is a difficult case. The children have been placed in an impossible situation by their mother's unlawful actions. The strength of the boys' opposition to return was a 'known known' in June, and the fact that five months later they are still firmly of that view in no manner undermines the basis of the court's decision to order return.

31. In all the circumstances, it is not possible to identify any basis upon which the proposed set aside application could succeed. If the test is properly applied to the underlying factual material, there is no basis upon which an application for set aside could properly be made here. Thus, if permission were to be given to either or both boys to be separately represented, the only application that they seek to make would be bound to fail and would be likely to be summarily dismissed.

(b) Would the children be joined as parties at this stage?

32. The decision to make a child a party will always be exclusively that of the court made in the light of the facts and circumstances of the case. PD16A, para 7.2 offers a list of factors by way of guidance, but the decision is fundamentally a 'best interests' determination.

33. It is accepted that the sole reason which justified the court in joining both children as parties to these proceedings was because of the parallel asylum proceedings. These have now concluded and so that justification has fallen away. It is submitted that the following factors would now justify the children being parties:

    i) The children's standpoint or interest is now inconsistent with or incapable of being represented by one of the adult parties;

    ii) The views and wishes of the children cannot adequately be represented by a report to the court; and

    iii) An older child is opposing a proposed course of action.

34. Taking each of these three factors in turn, firstly, it is not the case that the children's standpoint or interest is now inconsistent with their mother's or that she is incapable to putting it forward. They are not arguing for a different outcome to that which she seeks.

35. Secondly, whilst it may be that if the proceedings were continuing a further report might be ordered, hitherto the report of the guardian has (as Moylan LJ confirmed) allowed the children's position to be made abundantly clear to the court. In addition, the court now has the two witness statements of Ms Hansen by way of report. It would not, therefore, be necessary for the children to be parties to the proceedings for their views and wishes to be reported to the court.

36. Thirdly, it is the case that both boys oppose the proposed course of action, but that course has now been determined by the court. It was determined after taking full account of the boys' opposition. The proceedings have now concluded and there could be no justification, on its own, for now joining the children as parties on that basis.

37. More importantly, addressing the need for a best interests evaluation, there are, in my view, very strong welfare grounds for limiting the degree to which these two vulnerable children are drawn any further into this adult dispute.

38. The conclusions that I have now stated beg the question whether it is now in the children's interests to remove their party status as, as I have concluded, there is no continuing basis for it. I have considered this option at some length during the hearing and when preparing this judgment, and have finally concluded that it would not be in their interests to remove them as parties at this late stage in the process. My primary reason for so holding is the way in which such a decision is likely to be viewed by the boys. It might well be seen in a very negative light by them and, because the proceedings have concluded, to make such an order would be of no procedural consequence. I will not therefore discharge the children as parties, but the conclusion that there is now no proper basis for them to be a party does carry some weight when determining the application for separate representation and it goes against granting that application.

(c) Are the children's views compromised by enmeshment with those of their mother?

39. Any reading of the papers in this case, the proceedings before Judge Love and those before the FtT, leads to a very short answer to the above question. The children's views must be compromised to a significant degree by enmeshment with their mother's all-pervading view of their father. Her view has not been found to have any basis in evidence, yet the children, who have lived in one room with their mother for over two years, and have had no contact with their father in that time, must be wholly immersed in it.

40. The degree to which the children's autonomy of opinion is likely to have been compromised by their involvement with their mother is of relevance to the assessment of their ability to give direct instructions to Ms Hansen as it must impact upon their ability to have an independent understanding of the issues in the case in any real sense. Whilst Ms Hansen was, as she states, concerned that there was a finding that both boys had been influenced by their mother, it is not clear from her statements that she fully contemplated the degree to which this is likely to be the case on the basis that I have now summarised.

(d) Separate Representation: Conclusion

41. The starting point must be Ms Hansen's experienced professional evaluation of the key question [FPR 2010, r 16.29(2)] of whether the child 'is able, having regard to the child's understanding' to give instructions to her as his solicitor.

42. With respect to B, the answer is that Ms Hansen does not yet consider that B has achieved a sufficient level of understanding and if he were the only subject child in the proceedings she would not be applying on B's behalf for separate representation. That, in my view, is the end of the matter so far as B is concerned at this time. There is a need for a principled approach and if the necessary standard of understanding is not met then the model for representation is for a children's guardian to be the source of instruction rather than the child himself. I do not accept the submission put forward by Mr Niven-Phillips that where there is an older child who does have sufficient understanding then, in some unspecified way, the degree of understanding required from his younger brother could be reduced. The application for B to be separately represented is therefore refused.

43. The position with A is different. Ms Hansen has assessed A as having sufficient understanding to give direct instructions to her, and, whilst I have expressed very serious doubt that she has given appropriate weight to the degree to which A's autonomy is likely to have been compromised by his mother, it is neither appropriate nor possible for the court to substitute its view for that of a most experienced professional who has spent a considerable amount of time with him.

44. But, if A is able to give direct instruction to Ms Hansen, the court is entitled to ask 'for what purpose?'. For the reasons that I have already given, the answer to that question must be 'none'. Firstly, the proceedings are at an end, other than the fine tuning of the return order. Secondly, the only stated purpose relied upon in the application was to pursue an application to set the June decision aside. For the reasons that I have given, that proposed application is unarguable and has no prospect of success. Thirdly, A is currently a party because of the now historic parallel asylum case. If he were not a party there is now no additional justification for making him one and, were it not for the adverse message that this would send and for the fact that the proceedings are at an end, the proper order should be that he now be discharged as a party.

45. Drawing all of these matters together, my clear conclusion is that the application for A to be separately represented is refused. The result is that, for what remains of these proceedings, the interests of both boys will continue to be represented by the guardian and Mr Niven-Phillips.