Neutral Citation Number: [2024] EWHC 720 (Fam)

Case No: FD23P00596

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 March 2024

Before :

MR RICHARD TODD KC
(Sitting as a Deputy High Court Judge)

- -

Between :

R	**Applicant**
- and -	
M	**Respondent**
And others	

- -
- -

Mr. Christopher Hames K.C. and Mr. Edward Bennett (instructed by **Messrs Freemans**) for the applicant, step-father,
Mr. Mark Jarman K.C. and Mr. Mani Singh Basi (instructed by Messrs **RWK Goodman)** for the 1st respondent,
Miss. Jacqueline Renton (instructed by **LDJ Solicitors)** for the 2nd respondent,
Ms. Mehvish Chaudhry and Ms. Mavis Amonoo-Acquah (instructed by **Messrs Goodman Ray)** acting *pro bono* for the 3rd respondent,
Mr. Michael Gration K.C. and Mr. Frankie Shama (instructed by **Messrs Dawson Cornwell**) acting *pro bono* for the 4th respondent, and
Ms. Alev Giz (instructed by **Messrs Creighton and Partners** on behalf of CAFCASS) on behalf of the 5th-6th respondent children, by their Guardian

Hearing dates: 28, 29 February and 1 March 2024

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JUDGMENT

This judgment was handed down in private on 18 March 2024. It consists of 78 paragraphs and has been signed and dated by the judge. The judge gives leave for it to be reported in this anonymised form as *R v M (Hague Convention; Withdrawal of Application and Art. 16 (Parental Responsibility))***.**

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by his or her true name or actual location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

The names of the parties have been anonymized and are referred to on a separate sheet which the Court and the parties has, but which does not form part of this Judgment.

Deputy High Court Judge Richard Todd KC :

1. I have been hearing applications brought within Hague Convention proceedings concerning two children known as, D (who is 14) and K (who is 9). The matter was listed before me for three days. The parties very sensibly engaged in collaborative and ultimately successful negotiations for much of the first day resulting in the compromise of many issues. The compromise reached was manifestly in the best interests of the children. However there were outstanding issues of (a) leave for the applicant to withdraw his application and (b) an application by the applicant for recognition of rights of parental responsibility which he says were gifted to him by a competent Court of jurisdiction in New Zealand. He prayed in aid the provisions of Article 16 of the 1996 Hague Convention. After hearing legal submissions, I gave my decision at the end of the third day. First, I gave permission to withdraw the application. Second, I dismissed the application under Article 16. I reserved Judgment. This is my Judgment giving the reasons for my decisions.

The Parties

2. The parties are:

   (a) R is the children's step-father. He is a New Zealand national. He is 30 years old. He is represented by Christopher Hames KC and Edward Bennett, instructed by Freemans. He is the Guardian of D only, pursuant to an order of the Family Court at North Shore NZ (NZ court) dated 24 April 2018. He is currently residing in Auckland, NZ.

   (b) M is the children's mother and first respondent. She is represented by Mark Jarman KC and Mani Singh Basi, instructed by RWK Goodman. M was born in Tanzania but holds British citizenship. M is currently living in New Zealand. She is 33.

   (c) MA, the second respondent is the children's maternal aunt. She is represented by Jacqueline Renton, instructed by LDJ solicitors. The children, D and K are living with MA in Leicester. The children have been in her care since 14

October 2023. They remain living with her. MA was also born in Tanzania, but holds British citizenship. She has a child of her own who is 8 years old and has always lived in England.

(d) DF, the third respondent. He is the biological father of D. He is 38. He has parental responsibility for D by virtue of being named on the birth certificate. He is represented by Mehvish Chaudhry and Mavis Amonoo-Acquah, instructed by Goodman Ray. They are acting *pro bono.* DF lives in London with his partner, and their daughter who is 2 years old.

(e) KF is the fourth respondent. He is the biological father of K. He is 35. He is represented by Michael Gration KC and Frankie Shama, instructed by Dawson Cornwell. They act *pro bono.* He lives in London. He lives with his fiancée and their two children. He also has two children from a prior relationship. He has recently resumed a relationship with K.

(f) The Guardian acts for the 5th – 6th respondents who are the children the subject of this application. The children are represented by Alev Giz, instructed by Creighton and Partners (on behalf of Cafcass). D and K were born in England and hold British citizenship. They lived in New Zealand from November 2016 until 13 October 2023 when they came to England. D was born with talipes and is currently being assessed for ASD.

Representation

3. I have been more than usually assisted by counsel whose expertise has shone through in both the written and oral advocacy. Similarly the preparation by all the solicitors has been exemplary. This is all the more impressive as the key Article 16 issue was not trailed in advance of R's Skeleton Argument. As such it has had to be responded to on relatively short notice. (I make no criticism of R's legal team for this – the case has been constantly evolving and the Article 16 application was the consequence of a late concession by R as to the need to withdraw his application).

4. I am especially grateful to those leading, junior counsel and solicitors who have appeared *pro bono*. Michael Gration KC, Frankie Sharma, Mehvish Chaudhry, Mavis Amonoo-Acquah, Messrs Dawson Cornwell and Messrs Goodman Ray have all given their time freely and generously. The Court is grateful for both their assistance and their generosity. Indeed, although described as "*pro bono*," the reality is that this representation will have been provided at personal cost in time and money for those representatives. There may come a time where such helpful representation falls foul of the exigencies of those lawyers' personal economies. If or when it does, the Courts will need to look again at how the legal representation of these parties is to be funded. I merely note in passing that the ordinary consequence of a civil litigant withdrawing a claim is that the withdrawing partner (and potentially their financial backers; here the Legal Aid fund) usually bear the other parties' costs[1]. That time has not yet come. Happily for me, no such application has been made here.

5. There may come a time when the State may have to reconsider the availability of non-means tested legal aid (as it provides, for example, to the Central Authority in 1980 Hague Convention cases) rather than just relying on the generosity of individual lawyers. The provision of such public funding would be so much better than the Court having to consider applications for costs of the sort which regularly used to be made by the Official Solicitor in litigation involving a public authority. Other remedies and costs orders are available to the Court. It is a pressing matter of fairness, equality of arms and access to justice but happily not an issue for today. But the time may come when it is an issue. That is, unless legal aid is extended in cases such as these; thereby avoiding the unwelcome need for these Courts to consider costs' orders against public authorities.

Background.

[1] This is, of course, a very general statement. But analogy can be found with CPR 38.6 (1), "*Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant.*" (Albeit the similar provision in FPR 29.4 is silent on the costs' consequences). The Family Procedure Rules does contemplate costs orders in children proceedings in the right case (e.g. the undertakings required to meet any such orders in FPR 16.9 (2)(c) and FPR 16.24 (5) (c)). The width of the Court's discretion is found in FPR 28.1, "*The court may at any time make such order as to costs as it thinks just.*"

6. M and the father of D, DF met in 2008. They began to cohabit in late 2009. D was born in London on the 18 February 2010. Ealing Children Services became involved following a complaint by M of domestic abuse. They undertook an initial assessment and then no further action. In late 2011, DF and M separated.

7. There were court proceedings between M (the mother) and DF which commenced on 28 February 2012. He sought residence, contact and a prohibited steps order. An interim order was made in those proceedings that D should not be removed to Tanzania. A final order was made on 10 February 2014 which provided for D to live with M. D was to have contact with DF on alternate weekends and during the week. Social services were involved with these parties from 2010 until 2014. In particular on the 12 May 2014, there was a Child Protection Conference in respect of D at which concerns were expressed about possible neglect and M's mental health. I have read the local authority child and family assessment and also the Cafcass report. Save for two video calls in 2020, DF did not see D after M removed him to New Zealand in October 2016 until after D returned to England in October 2023 (save for two video calls with him in 2020).

8. In 2013 M began a relationship with KF. They were in a relationship for between 7 and 9 months. They separated due to pressures arising from KF's previous relationship with a woman who is the mother of his two previous children. However, during their relationship, M had become pregnant with K. KF accepts, with hindsight, that he was wrong to abandon a relationship with his daughter, K.

9. M went on to give birth to K on 5 June 2014. The only contact that KF had with the mother and K was via his own mother. That contact was sporadic and deteriorated on M meeting R, the applicant in these proceedings.

10. KF was not named on K's birth certificate. He does not have parental responsibility and did not have any contact with K from 2014 to 2023.

11. In July 2014, M moved from the London Borough of Ealing to Barking and Dagenham. On the 4th July 2014, the London Borough of Barking & Dagenham held a Child Protection Conference in respect of both D and K. There were fears about neglect and a Child Protection Plan was put in place. This was followed by the

compilation of another plan on 10 October 2014. By 26 March 2015, this had been stepped down to a Child in Need plan.

12. In 2015 or 2016, R and M met through online gaming. R was in New Zealand and M in England. At that time, DF was still spending time with D on a regular fortnightly basis.

13. Between June and July 2016, R came to England and spent time with M, D and K.

14. In November 2016, M relocated to New Zealand with D and K. This removal was without the knowledge or consent of DF. He says he did not know of the plan to move until he turned up at M's home and was told that she no longer lived there.

15. R and M married in Auckland, New Zealand on 10 March 2017. M obtained a partnership visa whilst D and K were given student visas.

16. On 24 April 2018, M gave birth to S. R is the biological father of S.

17. M then applied for her husband, R, to be made the guardian of D. DF became aware of this in July 2018. He says that this was the first time that he became aware that his son, D was living in New Zealand. DF enlisted the support of his local Member of Parliament, the charity, Reunite and the Bar Pro Bono Unit for assistance.

18. On 5 September 2018, DF indicated to D's appointed lawyers that he opposed the guardianship application. Further, that D had been abducted.

19. On 7 November 2018, R was appointed as an additional guardian in New Zealand. DF says he was unaware of this.

20. During 2020, M asked DF to agree for D to live in New Zealand. DF refused.

21. In May 2021, there was the "Whangari incident". M was irate with the children; so much so that the local police became involved. M was arrested. She was charged with assault. She was subsequently acquitted after a 2-day trial. I have not seen the detail of that trial.

22. On 17 July 2022, M travelled to Canada, leaving D, K and S with R. I am told that M wished to visit her new partner. M and R separated.

23. In August 2022, M returned to the family home in New Zealand. She sought a reconciliation. R agreed. M then revealed that she was pregnant with her and the Canadian boyfriend's child. She says she had decided to abort the unborn child. R ended the reconciliation. M had an abortion.

24. On 6 July 2023, there was an incident when M locked the children in her room and told them not to associate with R (who had been spending time in the neighboring property which was occupied by R's mother). DF says during this incident, he was telephoned by M who told him that her marriage had broken down and she wanted D and K (but not S) to return to England and be cared for by DF. She alleged that R had been abusive. DF said he can care for D but not D and K.

25. On 16 August 2023, M disappeared from the family home. R therefore applied to the North Shore Family Court for an order preventing the removal of S from New Zealand. The order was granted on short notice. That same day D, K and S were removed from their schools by M.

26. In the meantime, M had introduced, via a telephone call, K to her father, KF. This also took place in August 2023. In September, M, claiming concerns about D and K's safety in New Zealand, discussed plans to move D and K to England.

27. On 12 September 2023, the North Shore Family Court granted a shared parenting order for D, K and S. They made provision for the children to spend time with R during the week and with M at weekends. Judge S J Maude sitting in the North Shore Family Court held that:

    a. He considered it imperative that the children be returned to school;
    b. directed that the 3rd respondent be served with the proceedings and provided with an opportunity to respond;
    c. gave directions as to the filing of evidence;
    d. directed a social work report;
    e. ordered that, in the interim, the parties were to share care of all three children, such that the children:

i. would live with the applicant from 5pm on Sunday until 5pm on Thursday;
ii. would live with the 1st respondent from 5pm on Thursday until 5pm on Sunday.

This welfare decision was not appealed.

28. On 13 October 2023, M put D and K on a flight from New Zealand to England. They travelled as unaccompanied minors. This move was unknown to R. D told the Guardian that "*he was only told of the plan to leave when he was collected from school and K was told once they were on the way to the airport. He described being rushed onto the airplane and an attendant being assigned to them*." The children were removed from New Zealand, R says, without his consent. M has advanced a case that there was some form of consent. It is not controversial that DF's consent, KF's consent or the approval of the New Zealand court was not obtained. That said, all parties accept that for the purposes of the Hague Convention 1980 (which New Zealand is a signatory to) this was an unlawful removal by M.

29. On arrival at Gatwick airport, the children were met by their maternal aunt, MA.

30. On 18 October 2023, the North Shore Family Court varied the interim parenting arrangement such that now R was to have "full day to day care" of S.

31. DF had his first contact with D in seven years on the 28 October 2023. KF met K for the first time on 18 November 2023 in the maternal aunt (MA's) home. Since then, KF has spent time with K on occasions including on 18 November 2023; 16 December 2023, and 30 December 2023. With the assistance of Ms Demery from Cafcass, this developed into an overnight stay on the 19 to 20 February 2024.

Current application

32. On 16 November 2023, the New Zealand Central Authority formally requested assistance from the Central Authority in England and Wales to obtain the return of D and K.

33. The applicant issued these 1980 Hague proceedings without notice on 1 December 2023. On 4 December 2023, HHJ Moradifar, sitting as a Deputy High Court Judge,

made a location order, various other directions, and listed an on notice hearing for 13 December 2023.

34. At the return date on the 13 December 2013, Poole J gave comprehensive directions to prepare the matter for trial. He directed DNA testing in relation to KF and a wishes & feelings report in respect of the children.

35. On 7 February 2024, Ms. Demery filed and served her wishes and feelings report. She said, § 48, that "*what struck me about both children, was that they found it difficult to articulate their actual feelings, for example when they suddenly* [were] *placed on* [an] *airplane and travelling for 29 hours without a parent to a country of which K would have no memory and D scant recollection of to stay with albeit their aunt but not someone that either child knew well before* [they] *arrived"*.

36. The PTR was before Sir Jonathan Cohen on 9 February 2024. Cafcass had written to the court indicating that it was its view that the children should be separately represented. All parties agreed to this course. The children were joined and Ms Demery was appointed as their guardian. The DNA testing report showed a 99.9% chance of KF being K's father. The conclusions in that report were not challenged by any party. The court also granted R's application for expert evidence as to New Zealand immigration law. That was ordered by consent. Importantly, it did not deal specifically with whether R had parental responsibility in New Zealand.

37. Since the PTR, the New Zealand Immigration Law Expert has lodged his report, and answers to further questions. The essence of that report is that:

    i. The Mother does have immigration options in New Zealand should she choose to exercise them;
    ii. D and K could enter New Zealand on six-month visitor visas which they would obtain at the border – they could attend school on these visas as international students;
    iii. D and K, were they returned to the mother's care, could be granted dependent child temporary student visas – all holders of PR would have to consent to this – they could attend school as domestic students (non fee paying).

38. I am grateful to the Guardian for her input including an updating position statement setting out her conversations with the adult respondents (save for M whom she had not been able to contact but whom she spoke to on 23 February 2024 and thereafter circulated her note of their conversation).

39. All adult respondents sought to defend these proceedings in reliance upon Article 13(b) (grave risk/intolerability) and Article 13 (Child's Objections). M, in addition, relies on Article 13(a) (Consent). None seek to argue that M's conduct amounts to anything other than an unlawful removal of the children from the state of their habitual residence for the purposes of Article 3 and Article 12. On the facts, it would have been unrealistic for any such contention to be advanced.

40. The Family Court at North Shore, New Zealand, was seised of private law proceedings concerning all three children, D, K and S. A final hearing in New Zealand is currently listed for July 2024, but may be brought forwards to a date in May 2024, subject to an unrelated case coming out the court list. Pursuant to orders of that court, R has guardianship of both D and K and sole residence of S. R concedes that since late February 2024 the habitual residence of D and K is in England and Wales. I do not know but assume that in the current circumstances the New Zealand court will decline to make any orders in respect of D and K. (On the same basis and in accordance with principles of comity, this Court will not make any orders in respect of S, who is habitually resident in New Zealand).

Withdrawal of the application for summary return

41. R now seeks permission from this court to withdraw his application for the summary return to New Zealand of D and K. Ordinarily such applications are made in writing but as all parties are present, this application has been made orally by leading counsel in court.

42. This Court does not act as a rubber stamp for applications to withdraw even when all the parties consent to this. The position is found in FPR r 29.4 which provides in respect of permission to withdraw an application:

"*Withdrawal of applications in proceedings*

(1) This rule applies to applications in proceedings-

(a) under Part 7;

(b) under Parts 10 to 14 or under any other Part where the application relates to the welfare or upbringing of a child or;

(c) where either of the parties is a protected party.

(2) Where this rule applies, an application may only be withdrawn with the permission of the court.

(3) Subject to paragraph (4), a person seeking permission to withdraw an application must file a written request for permission setting out the reasons for the request.

(4) The request under paragraph (3) may be made orally to the court if the parties are present.

(5) A court officer will notify the other parties of a written request.

(6) The court may deal with a written request under paragraph (3) without a hearing if the other parties, and any other persons directed by the court, have had an opportunity to make written representations to the court about the request."

43. It is now settled law that FPR r 29.4 applies to applications in proceedings under the 1980 and 1996 Hague Conventions. Earlier authorities which appeared to suggest that permission to withdraw was not required were not cases where the Court was asked for permission to withdraw as mandated in FPR 29.4. (See *AA v TT (Recognition and Enforcement)* [2015] 2 FLR 1 and *In re G (Children) (Abduction: Withdrawal of Proceedings, Acquiescence and Habitual Residence)* [2008] 2 FLR 351 at para 16).

44. The procedural requirement of permission for the withdrawal of proceedings is not limited to cases involving children. FPR r 29.4(1)(a) applies rule 29.4 to applications in proceedings under FPR Pt 7, (applications in matrimonial and civil partnership proceedings). It is not qualified as only applying where the application concerns the welfare or upbringing of a child.

45. When should the Court exercise its permissive powers? This leaves the question of what test is to be applied on an application to withdraw proceedings. Where an application to which FPR r 29.4 applies concerns the welfare of a child, the application for permission to withdraw will itself be an application concerning the

welfare or upbringing of a child and the test will be the welfare principle set out in section 1(1) of the Children Act 1989: see *Southwark London Borough Council v B* [1993] 2 FLR 559, 572. Since an application in proceedings under the 1980 Hague Convention is not one concerning the welfare or upbringing of a child, the test for deciding whether to give permission to withdraw such an application is not the section 1 (1) test. Instead, in such a case the test will centre on those matters set out in the overriding objective at FPR r 1.1(2), including the need:

(i) to deal with the proceedings expeditiously and fairly,
(ii) to deal with cases proportionately,
(iii) to save expense and
(iv) to ensure the appropriate sharing of the court's resources.

The court is not prohibited entirely from considering issues of welfare, because the overriding objectives include a requirement that the court deals with cases fairly.

46. In *Ciccone v Ritchie* (No 2) [2016] EWHC 616 (Fam). MacDonald J held,

"74. It would not serve the ends of justice to compel a party to pursue an application under the 1980 Hague Convention that they wish to bring to an end. Indeed, whilst not ruling out such a course of action entirely, it is very difficult indeed to think of a circumstance where the court would compel an applicant in proceedings under the 1980 Hague Convention to pursue an application they have indicated they wish to withdraw. Further, having regard to the overriding objective, there are positive merits in this case to permitting the mother to withdraw her application in this jurisdiction. As I observed during the course of the hearing, at present the existence of parallel proceedings in two jurisdictions, before two judges with two sets of lawyers is introducing unnecessary and unhelpful complexity and hindering attempts at settlement, as well as incurring considerable expense. Accordingly, I give permission for the mother to withdraw her proceedings under the 1980 Convention."

47. To the above sage words, I would add the observation that ordinarily parties should not be compelled to bring or continue litigation which they do not wish to continue

with. Parties are entitled to bring proceedings against such persons and under such causes of actions as they choose but they cannot usually be compelled to bring or continue those proceedings (*Pawley v Whitecross Dental Care Ltd* [2021] EWCA 1827 CA at [32]). There might be costs consequences of discontinuance or withdrawal but that is different from insisting that parties continue with litigation which they are all agreed should be withdrawn.

48. Where all the parties are agreed that the application should be withdrawn and there is every good reason under the overriding objective to accede to this request, it seems to me that I should and I must accede to the application to withdraw.

Article 21

49. R also invites this court to consider his proposed application under Article 21 of the Hague Convention for organising and securing the effective exercise of rights of both himself to his step-children and for S to her half-siblings. These arrangements have been agreed between the parties. They are manifestly in the best interests of the children. Whether those orders are made under Article 21 or pursuant to the Children Act (once the Hague Convention proceedings are withdrawn) is an arid point which counsel have entirely rightly chosen not to trouble me with. I am happy to approve them as orders properly made in respect of children who are now habitually resident in England and Wales.

50. As already indicated R accepts (as he must) that D and K are now no longer to be subject to New Zealand court jurisdiction. He accepted that by late February (at the latest) the children have acquired a habitual residence in England and Wales. No party has sought to argue that this court has anything other than a full welfare jurisdiction over D and K.

Article 16 Recognition of New Zealand Parental Responsibility

51. R's case is that his parental responsibility for D and K should be recognised either by (a) by operation of Article 16 and Article 20 of the 1996 Hague Child Protection Convention which applies as between Contracting States (the UK) and Non-Contracting States (New Zealand). He prays in aid the decision of *Re M (a child:*

adoption proceedings) [2014] EWHC 1128 (Fam) §27 per Theis J[2] or (b) as a fall-back position, under section 4A of the Children Act 1989. I have already indicated that the s. 4A application needs to be brought properly on notice and should be the subject of those separate proceedings.

52. It is by no means clear that the New Zealand court has given R parental responsibility over the children, D and K. (If he has no such Parental Responsibility then he has nothing that can be recognised under Article 16). Foreign law has to be proved. This Court cannot simply adopt English law and assume it is applied in New Zealand. Neither can the Court take judicial notice of matters of foreign law; even where the same terminology is used (and the words "parental responsibility" are not used in any of the New Zealand orders). There are many reasons for this including that the local law could be nuanced to the extent that there would be a risk of this Court going into error.

53. R relies on what is said by the expert on New Zealand law but the expert has not specifically turned his head to this issue. That is unsurprising as he is an Immigration law expert instructed for the sole purpose of advising on immigration law. Whilst it is correct that he was asked questions and one of these contained a reference to parental responsibility, I do not think that that helps me on finding that there was parental responsibility. The question was:

> **Question 11:** What weight would attach to any objection to a visa from a
> parent with parental responsibility?

54. That does not ask if there was parental responsibility for these particular children and does not ask the expert to deal with that issue. The answer to the question does not confirm parental responsibility. The answer was:

> **Response:** I am unable to answer this question with any degree of certainty given that I am not a decision-maker employed by Immigration New Zealand. Generally speaking, it would be a fact specific assessment and
> depend on the visa applied for.

[2] Paragraph [27] says, "*[27] Under art 16 of the 1996 Convention parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State. This is even if the State of habitual residence is a non-contracting State (Article 20).*" That was a case where the prospective adopting father did not have Parental Responsibility and so the point was not the focus of the judgment.

55. The Court orders in New Zealand do not refer to parental responsibility. I have been given a copy of the New Zealand Care of Children Act 2004. It also does not refer to the term "parental responsibility." But even if it had done so, I would have been loath, without expert evidence, to embark on an assessment and appreciation of New Zealand law without expert assistance. In this regard, I note in passing that the definition of parental responsibility used in the Hague Convention 1996 Article 1 (2)[3] is similar but not identical to the English definition. Parental responsibility in the Hague Convention 1996 is meant to have an autonomous wide international meaning (see the Lagarde Report, para 14). It does not therefore necessarily have the same meaning as that which applies under Children Act 1989; see *SM (Algeria) v Entry Clearance Officer [2018] 1 WLR 1035*.

56. I cannot and do not find that R has been given parental responsibility by the New Zealand courts. However there is a measure of similarity of rights which he has been given (especially in respect of D[4]). Therefore if I am wrong about him having parental responsibility I will consider whether I am required to recognise those rights as if he has been given Parental Responsibility for both D and K by the New Zealand court. But I do emphasise that I am proceeding on the basis (and without the benefit of further expert evidence of New Zealand law), that (a) unlike, say, a married parent, R does not have parental responsibility as of right but (b) he has been awarded it by the New Zealand court.

57. In England, section 4 of the Children Act 1989 provides with respect to the power of the court to make an order that a person shall cease to have parental responsibility:

"4 Acquisition of parental responsibility by father.

[3] "1 (2) For the purposes of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child."

[4] To further complicate matters, D and K are subject to different orders from each other in New Zealand. I decline, without expert assistance, to descend into the debate about whether guardianship and / or custody and / or the nature of interim orders can be equated with parental responsibility (whether as understood under the Children Act 1989 or the Hague Convention 1996).

Where a child's father and mother were not married to, or civil partners of, each other at the time of his birth, the father shall acquire parental responsibility for the child if—

(1) he becomes registered as the child's father under any of the enactments specified in subsection (1A);

(a) he and the child's mother make an agreement (a "parental responsibility agreement") providing for him to have parental responsibility for the child; or

(b) the court, on his application, orders that he shall have parental responsibility for the child.

(1A) The enactments referred to in subsection (1)(a) are—

(a) paragraphs (a), (b) and (c) of section 10(1) and of section 10A(1) of the Births and Deaths Registration Act 1953;

(b) paragraphs (a), (b)(i) and (c) of section 18(1), and sections 18(2)(b) and 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965; and

(c) sub-paragraphs (a), (b) and (c) of Article 14(3) of the Births and Deaths Registration (Northern Ireland) Order 1976.

(1B) The Secretary of State may by order amend subsection (1A) so as to add further enactments to the list in that subsection.

(2) No parental responsibility agreement shall have effect for the purposes of this Act unless—

(a) it is made in the form prescribed by regulations made by the Lord Chancellor; and

(b) where regulations are made by the Lord Chancellor prescribing the manner in which such agreements must be recorded, it is recorded in the prescribed manner.

(2A) A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders.

(3) The court may make an order under subsection (2A) on the application—

(a) of any person who has parental responsibility for the child; or

(b) with the leave of the court, of the child himself, subject, in the case of parental responsibility acquired under subsection (1)(c), to section 12(4).

(4) The court may only grant leave under subsection (3)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.

58. The enactments referred to in s.4(1)(a) and s.4(1A) do not include the 1996 Convention. (New Zealand is not a signatory of the 1996 Convention but is a signatory of the 1980 Convention; therefore Article 16 of the 1996 Convention would apply to New Zealand as a non-convention country). Article 16 of the 1996 Convention is addressed in the Family Procedure Rules 2010, Rule 12.71. The rule deals with the question of whether a person has or does not have parental responsibility, and the question of the extent of that parental responsibility, by virtue of the application of the 1996 Convention:

> **Application for a declaration as to the extent, or existence, of parental responsibility in relation to a child under Article 16 of the 1996 Hague Convention**
> **12.71**
> (1) Any interested person may apply for a declaration –
> (a) that a person has, or does not have, parental responsibility for a child; or
> (b) as to the extent of a person's parental responsibility for a child, where the question arises by virtue of the application of Article 16 of the 1996 Hague Convention.
>
> (2) An application for a declaration as to the extent, or existence of a person's parental responsibility for a child by virtue of Article 16 of the 1996 Hague Convention must be made in the principal registry and heard in the High Court.
>
> (3) An application for a declaration referred to in paragraph (1) may not be made where the question raised is otherwise capable of resolution in any other family proceedings in respect of the child.

59. I pause here to say that R ought to have brought an application under FPR 12.71. It should have been supported by expert evidence. The other parties should have had a proper opportunity to respond to the evidence of New Zealand law. Mr Jarman KC is right when he says that depriving the other parties of those opportunities should only be justified in a case of urgency; there was not that urgency here. Had the application been on proper notice and supported by evidence, it would have then been possible to take a view of whether there was parental responsibility and / or the extent of that parental responsibility. It would then have been possible to make the necessary declarations.

60. Chapter III of the 1996 Hague Convention is concerned with Applicable Law. The first Article in that part is Article 15. It provides that in exercising their jurisdiction under the provisions of Chapter II of the Convention, the competent authorities of the Contracting States shall apply their own law (*lex fori*) subject, in exceptional circumstances, to applying or taking into account the law of another State:

"**Article 15**

(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

(2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

(3) If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence."

61. Article 16 of the 1996 Hague Convention represents a qualification on applicable law. It makes a distinction between parental responsibility which is acquired by way of birthright and that which is acquired by the intervention of judicial or administrative authorities (and by agreement).

"Article 16

(1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.

(2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.[8]

(3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

(4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence."

Discussion

62. The competing contentions of the parties may be summarised briefly. Mr Hames KC says on behalf of R that each sub-paragraph is a stand-alone provision allowing him to select sub-paragraph (3) without reference to the other paragraphs. The other parties maintain that Article 16 must be read holistically and progressively. They say that R's case at its highest is that parental responsibility was acquired by the intervention of a judicial authority. (They do not accept that parental responsibility was awarded *at all* but at its highest it was by court order). Applying (1), they say that Court ordered parental responsibility is simply outside of Article 16. Therefore, we simply do not come to (3).

63. Whilst not of force of law, I am assisted by both the accompanying *Lagarde Report*[5], *The Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*[6] and the *1996 Hague Convention Practice Guide*[7]. I have found each of these guides to be helpful and set out here the more relevant parts with my emphasis supplied:

64. (1) **The Lagarde Report**:

Paragraph 105,

> "Paragraphs 3 and 4
>
> 105 These two paragraphs **are intended to govern the very delicate problem of the effect of the change of habitual residence of the child on parental responsibility**. ….
>
> 106 …..
> In the hypothesis where the law of the former habitual residence had no provision for parental responsibility **arising by operation of law** and the law of the new habitual residence did make provision for such responsibility, it seemed obvious that only the second law should be applied. The Commission, considering that this solution went without saying, did not think that it was useful to formalise it in a text, but it results implicitly from the first paragraph.

[5] The Lagarde Report, P. Lagarde HCCH, "The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children".
[6] *The Practical Handbook on the Operation of the 1996 Hague Child Protection Convention (*HccH, 2014).
[7] *1996 Hague Convention Practice Guide* (published by the Ministry of Justice, February 2013).

> In the hypothesis where the law of the former habitual residence provided for parental responsibility **by operation of law** and the law of the new habitual residence makes no such provision, the consideration for continuity of protection is at its strongest, and paragraph 3 of Article 16 indicates that 'Parental responsibility which exists under the law of the State of the child's habitual residence subsists after at habitual residence to another State'.
>
> "107 The third hypothesis is that in which both laws provide for parental responsibility **by operation of law**, but are in conflict on which person or persons will be the holder or holders of such responsibility. **Paragraph 3 of Article 16 is also applicable to this situation, in that it leaves parental responsibility resulting from the law of the first State subsisting, but it must then be read with paragraph 4**. This text in a certain way hooks on to the train of the first State the additional railway car of the second State. Indeed, without going back on the solution of paragraph 3, **it decides in substance that the internal law of the second State will apply if it attributes by operation of law parental responsibility to a person to whom the law of the first State, applicable under paragraphs 1 and 2, had not attributed it.**
>
> If, for example, the law of the first State attributed **by operation of law** parental responsibility to the child's unwed mother and the law of the second State attributed by operation of law this responsibility to the father and to the mother, or even only to the father, the law of the second State would be applicable, in that it adds a holder of the parental responsibility to the one who already exercised it in application of the law of the first State. In the reverse case, if for example the law of the first State attributed parental responsibility jointly to the father and the mother, and the law of the second State attributes it only to the mother, the law of the second State would remain without any effect on the rights of the father who, under paragraph 3, would retain the parental responsibility which had been attributed to him by the first law."

65. It will be noted that in every case, the example is of parental responsibility arising by operation of law and not by administrative or judicial intervention.[8]

66. ***(2)*** *The Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*[9]

[8] The Lagarde Report makes clear that Article 16(2) still applies if there has been "purely passive intervention by an authority which is limited to registering the agreement or the unilateral act, without exercising any control over its substance…" Para. 103, fn.54.

[9] Op. cit. p. 96

What happens to the attribution or extinction of parental responsibility when a child's habitual residence changes?

article 16(3), 16(4)

- Parental responsibility **which exists under the law** of the State of the child's habitual residence subsists after a change of the child's habitual residence to another State.[279] This is the case even if the State of the child's new habitual residence would not provide for parental responsibility in the same circumstances.[280]

- The attribution of parental responsibility **by operation of law** to a person who does not already have such responsibility is governed by the law of the State of the child's new habitual residence.[281]

- The purpose of these rules is to secure continuity in parent-child relationships.[282] The result of the rules is that a change in a child's habitual residence, in and of itself, cannot result in a person **losing** parental responsibility for a child, but it can result in another person **gaining** parental responsibility for a child.

- The co-existence of several holders of parental responsibility which may result from an application of these provisions can only work if the holders of parental responsibility generally agree.[283] If there is disagreement between them, this can be resolved by a measure requested by one or more of them from the competent authority with jurisdiction (see **Chapter 4**, supra).[284]

- **example 9 (e)** A child is born in Contracting State A where both unmarried parents have parental responsibility for the child **by operation of law**. The mother moves with the child to Contracting State B where the law provides that an unmarried father can only acquire parental responsibility by court order. The parental responsibility of the father acquired in Contracting State A by operation of law will subsist after the move.[285]

- **example 9 (f)** A child is born in Contracting State A. The child's parents divorce shortly after her birth. Under the law of Contracting State A, both parents retain parental responsibility for the child after the divorce. Two years later the mother re-marries and the new couple and the child move to Contracting State B. Contracting State B has a rule whereby a step-parent has parental responsibility for his or her step-children by operation of law. In this case, after the child acquires his or her habitual residence in Contracting State B, there will be three persons who have parental responsibility for her: her mother, father and step-father.[286]

- **example 9 (g)** A child lives in Contracting State A with her father and his second wife, the child's step-mother. The mother and father of the child agree that the step-mother should have parental responsibility for the child. Under the law of Contracting State A, it is possible for parents to attribute parental responsibility to a step-parent, in writing. **The agreement does not need to receive the approval of any State authority but it must be registered with the appropriate ministry.** The mother, father and step- mother register their agreement accordingly.

- A year later, the father, step-mother and the child move from Contracting State A to Contracting State B. Under the law of Contracting State B, a step-parent cannot acquire parental responsibility for a child without a court order.

- **Since the agreement between the parties which took place in Contracting State A is one which did not require the intervention of a judicial or administrative authority** (see para. 9.11, supra), Article 16(2) applies such that the attribution of parental responsibility to the step-mother is governed by the law of the State of the child's habitual residence at the time when the agreement took effect (i.e., at the time when the agreement was registered). The child was habitually resident in Contracting State A at the time the agreement was registered and hence the law of Contracting State A applies to this question.

- Article 16(3) ensures that the step-mother's parental responsibility subsists in Contracting State B."

67. Thus, taking example 9g if the parental responsibility had arisen following the intervention of a judicial authority (as R contends here) then his Parental responsibility would not follow him to England such that it would have to be recognised as of right in England.

68. ***(3)*** *1996 Hague Convention Practice Guide*[10].

"The Lagarde Report notes that the effect of changes in a child's habitual residence on the attribution or extinction of parental responsibility was a matter which divided opinion during the negotiation of the Convention. Some experts favoured the application of the principle of mutability, so that the law applicable would simply change with each change in habitual residence; others favoured "continuity of the protection", whereby responsibility attributed by operation of law by the law of the State of habitual residence of the child would subsist following a change of habitual residence.

[10] Op cit. p. 30

> Article 16(3) provides for continuity, in a positive sense, that is to say, parental responsibility which exists will be retained following a move, even if not attributed under the law of the new State of habitual residence:
>
> > "Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State."
>
> It is also possible that a person from a Contracting State may wish to rely on Article 16(3) (their existing parental responsibility) rather than Article 16(1) (parental responsibility conferred by the law of the new state of habitual residence) because the parental authority **conferred on him or her by the law** of that earlier state would be wider than that conferred by parental responsibility under the law of England and Wales."

I also note that generally in the context of Art 16 (1) and (2) the Guide says at p. 95:

> "9.11 It should be noted that **if the attribution or the extinction of parental responsibility by agreement or unilateral act has to be reviewed or approved by a judicial or administrative authority, this review or approval will be characterised as a "measure of protection" which must be taken by the authorities with jurisdiction under Chapter II of the Convention, applying the law designated by Article 15 of the Convention.** However, if the intervention of the judicial or administrative authority is a purely passive intervention, e.g., limited to registering a declaration, an agreement or a unilateral act without exercising any control over the substance of the matter, **this should not be considered as an intervention amounting to a "measure of protection" and the attribution of parental responsibility will still fall within Article 16 as one arising "without the intervention of a judicial or administrative authority"**.

69. Again, the lodestar is that of the passive conferring of parental responsibility rather than its attainment through a judicial process.

70. I have also been helpfully referred by Mr Gration KC to the decision of *B v C (No. 2)* [2023] EWHC 2524 in which MacDonald J provided a comprehensive overview of the operation of Chapter 3 of the 1996 Hague Convention. He also deals with the law governing where public policy might intervene to prevent an Article 16 recognition. I have already indicated in my decision that that does not

arise in this case as I have decided I should not be affording recognition to the claimed parental responsibility.

71. However MacDonald J does also deal with Article 16 at paragraph [77] (again the emphasis is supplied by me):

> [77] In addition to being satisfied that D holds parental responsibility for A **by operation of Spanish law**[11], I am satisfied that following the mother and A returning from the jurisdiction of Spain to the jurisdiction of England and Wales A's habitual residence changed from the jurisdiction of Spain to the jurisdiction of England and Wales. In these circumstances, absent the engagement of Art 22 of the Convention in this case, I am satisfied that Art 16(3) of the Convention would operate to transport the parental responsibility **held by D by operation of Spanish law** into the jurisdiction of England and Wales, thereby rendering it susceptible to termination or modification by this court pursuant to Art 18 through the granting of measures of protection under English law under the jurisdiction conferred on the English court by Art 5, insofar as permitted by English law pursuant to Art 15(1).
>
> [78] Paragraph 105 of the Explanatory Report makes clear that the terms of Art 16(3) seek to chart a middle path between mutability, whereby each change of habitual residence would result in a change in the law applicable to the attribution and extinction by operation of law of parental responsibility, and continuity of protection, where the law applicable would remain the law that originally attributed or extinguished parental responsibility. In this context, pursuant to Art 16(3) the parental responsibility attributed by operation of law without the intervention of a judicial or administrative authority in the child's State of habitual residence will subsist following a change of habitual residence.
>
> [79] Under Art 16(3) therefore, where a change of habitual residence occurs, parental responsibility existing under the law of the original State of habitual residence, in this case Spain, will remain in force or in effect in the

[11] D has acquired parental responsibility by being registered on the birth certificate. The registration had been procured by fraud but until it was set aside had the effect of conferring parental responsibility by operation of law and not by any judicial or administrative intervention.

new State of habitual residence, in this case England. The Explanatory Report expressly contemplates at paragraph 105

Conclusion

72. Article 16 of the 1996 Convention represented a compromise between (a) mutability, whereby each change of habitual residence would result in a change in the law applicable to the attribution by operation of law of parental responsibility and (b) continuity of protection, where the law applicable would remain the law that originally attributed or extinguished parental responsibility.

73. The eventual compromise was that Article 16 was to be read progressively as contended for by all the Respondents in this case. If parental responsibility was created by judicial or administrative intervention (see Art 16 (1)) then the subsequent paragraph 16 (3) was not engaged. Under Article 16(3) the parental responsibility had to be attributed by operation of law without the intervention of a judicial or administrative authority in the child's State of habitual residence.

74. I am fortified in that view by the position being one regulated by the normal principles of private international law. If what Mr Hames KC says is correct then New Zealand will have acquired the right to declare the parental responsibility for D and K. By contrast, England (where the children are now habitually resident) would have the exclusive right to determine issues such as living with orders but not parental responsibility. It would result in some decisions being in the exclusive jurisdiction of England and another important welfare issue exclusively decided in New Zealand (which would probably not be able to exercise that power as the children would no longer be habitually resident there). This gives rise to a situation of dépeçage. That is not unlawful in itself (indeed the Rome Convention on the Law Applicable to Contractual Obligations Art 3(1) expressly permits this in a contractual setting). But it is supremely undesirable when it comes to welfare considerations of a child.

75. If I am right and New Zealand would decline future jurisdiction on the basis that the children are not habitually resident there, then it is hard to see how the New Zealand order could be discharged. If an application could be made to discharge it in England (say, as a Children Act matter) then that would sit uncomfortably with the Article 22 provision that recognition should only be refused on the basis of public policy[12]. It would easily undermine the intention of Chapter 3 of the 1996 Convention if recognition were afforded as of right under Article 16 (3) to a decision of the New Zealand court only for that to be extinguished the next day by a Children Act application. That is not the law.

76. Ms Renton asked me to consider this application as four questions. I will conclude this judgment by summarising my decision on each point.

1. *Should the application be dealt with today or should it be adjourned?*

   Had I thought that Article 16 (3) operated as contended for by R, then I would have given the other Respondents more time to respond. The matter is only raised in R's skeleton argument and the Respondents have had to prepare for this on short notice. Second, the evidence of the position in New Zealand is wholly inadequate; it precludes me from finding that the New Zealand court has awarded R parental responsibility. I could not make a declaration to that effect as contemplated by FPR 12.

2. *Whether the applicant has Parental Responsibility under New Zealand law?*

   I have insufficient evidence to make any such finding.

3. *If the A does have Parental Responsibility by judicial intervention whether Art 16 applies?*

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[12] Article 22

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child."

Art. 16 (3) does not apply.

4. If Article 16 (3) does apply then should Article 22 be applied?

Art. 16 (3) does not apply.

77. For the reasons above, I dismiss R's application for recognition of what he says is an award of parental recognition in New Zealand. I make it clear that this does not act as an issue estoppel preventing him from applying for parental responsibility in the usual way pursuant to the Children Act 1989.

78. Finally, I would wish to pay tribute again to all the legal representatives; for the excellent presentation of the papers, for the helpful and collaborative attitude and for the excellent advocacy; both written and oral.