

Return orders and the inherent jurisdiction after *Re NY*

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If a child is moved *unlawfully* across an international border and ends up in England and Wales, the courts plainly have the power in almost all cases to consider whether that child should be *summarily* returned to her original state. In the case of states with which the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“the Hague Convention”) is in force, the Hague Convention normally provides the legal mechanism for such an order. However, although it is clear that in cases where the Convention does not apply, its principles are not to be imported by analogy (*Re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80), the court nonetheless has a power to order the child to be summarily returned. That power is generally said to arise from the High Court’s inherent jurisdiction, though there are also authorities where the order has been made under s 8 of the Children Act 1989 (notably *Re J* itself). In this situation, although the court may make a ‘swift and unsentimental’ determination of the case, the lodestar in making the decision is the individual child’s welfare, because s 1 of the Children Act applies.

None of that is news. The question raised by the recent Supreme Court decision of *Re NY* [2019] UKSC 49, by contrast, is whether the court can *summarily* order that a child who has been brought to this jurisdiction *lawfully* should, nonetheless, be returned to the previous state where the child was living prior to the move. Much depends on the timescale of the case.

The easy case is where the child has been in this jurisdiction for a substantial amount of time and the parent seeking to move back to the previous home state makes a relocation application. A great many relocation applications are, indeed, such ‘going home’ type cases, where not only the applicant parent but also the child in question previously lived in the proposed destination state (see generally R George, “How Do Judges Decide Relocation Cases?” [2015] *Child and Family Law Quarterly* 377). These cases do not cause the court any particular challenge; the fact of the child’s previous residence elsewhere is merely part of the factual matrix to be assessed through the prism of the child’s welfare.

What, though, of the child who has been in this jurisdiction for only a short period of time? Does a parent whose child has, in effect, only just arrived here have to make a full relocation application, with the ensuing passage of time and expense associated with a full welfare

enquiry, or can that parent seek to ‘short-cut’ the application by seeking a *summary* return order akin to that which is available when a child has been unlawfully moved?

This was one of the key issues raised in *Re NY*, in which the authors acted for the appellant mother, led by Mark Twomey QC and instructed by Dawson Cornwell.

The facts

The parents were Israeli nationals. They married in 2013 and had a child, N, in 2016. The relationship ran into difficulties and, in an attempt to revive it, they decided to move to London. They rented property, the father found employment, and the child started at nursery. It was accepted that both considered the possibility that they might return to Israel if things did not work out in England, but there was no agreement about when or in what circumstances that would happen.

In London, the relationship soon broke down completely, and around two months after first arriving the father announced that he intended to return to Israel. He asked the mother to do so as well with N, which the mother refused to do. The police became involved at the mother’s behest, and the father then returned to Israel. He then promptly issued proceedings in the Rabbinical Court, followed by Hague Convention proceedings in London through the Central Authority.

The High Court

The case came on for trial before MacDonald J. He rejected the mother’s claim that, on the date of the alleged wrongful retention (namely, 10 January 2019) N had become habitually resident in England and Wales. He also rejected the mother’s claim of ‘grave risk of harm / intolerability’ under Article 13(b) of the Hague Convention.

However, the mother’s claim of ‘consent’ under Article 13(a) was accepted by MacDonald J. Rather than focusing on the question of consent to the *retention* of the child in England on 10 January 2019, however, MacDonald J looked at the father’s consent to the child’s *removal* from Israel in November 2018. Finding, naturally, that the father had consented to this, the discretion to decide not to return N arose. In exercising that discretion, MacDonald J noted that he was entitled to have regard to the general policy aims of the Hague Convention, and also noted that it is ‘of manifest benefit to a child to have decisions regarding their welfare taken in the jurisdiction of their habitual residence’ (para 71). He consequently ordered the child to be returned.

Further and in passing MacDonald J said, in what Lord Wilson later termed ‘a postscript’, ‘had I concluded that [N] was habitually resident in this country, I would have reached the same decision under the inherent jurisdiction’, i.e. to order the child’s summary return. Lord Wilson explained (para 16):

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

The Court of Appeal

The mother appealed to the Court of Appeal, successfully arguing that the trial judge had erred in relation to the finding that the child had been wrongfully retained in England on 10 January 2019. As Lord Wilson summarised it, ‘once the judge had found that there was no agreement between the parties to return to Israel if the marriage broke down, there was no ground for concluding that the mother’s retention of the child in England on and after that date had been wrongful’ (para 20).

Despite this key conclusion - one which required the mother’s appeal to be allowed against the order made at trial - the Court of Appeal went on to order that the child anyway be returned to Israel. Moylan LJ, giving the judgment of the Court of Appeal, effectively approached the appeal on the basis that MacDonal J had in fact made a determination *in the alternative* that the child would be returned under the inherent jurisdiction if he was wrong about the Hague proceedings; and, that this alternative determination under the inherent jurisdiction should be upheld.

The Supreme Court decision

The mother further appealed, now to the Supreme Court, on three grounds. The first argued that, if a return order was to be made outside the Hague Convention framework, the correct legal vehicle for such an order was a specific issue order under the Children Act, and not an order under the inherent jurisdiction. The second argued that, whatever the correct legal basis, neither the High Court nor the Court of Appeal had the appropriate welfare-focused evidence before it to make such an order within these proceedings and, in any event, such an order was wrong in welfare terms. The third argued that, in any event, the way in which the matter proceeded – with no application made and no warning given of the intention to make a welfare-based return order – was procedurally unjust.

The appeal was unanimously allowed by the Supreme Court. Lord Wilson gave the only judgment, the effect of which was to dismiss the original application for a return order; the father’s proposal that the matter be remitted to the trial judge was also rejected.

The inherent jurisdiction

The mother's argument on the first ground was not, as seemed to be thought by some, that the court has no power to make a summary return order outside the Hague Convention. It was simply that there is an available statutory remedy available in such cases and, therefore, no principled basis for having recourse to the High Court's inherent jurisdiction.

This position was argued from first principles, including going back to core constitutional principles set out in cases such as *Attorney-General v de Keyser's Royal Hotel* [1920] AC 508 (HL) and *Richards v Richards* [1984] AC 174 (HL), arguing that once Parliament has enacted a statutory remedy in relation to a particular issue, it is not open to the court to achieve the same end by way of the inherent jurisdiction. It was argued, in particular, that this was significant because the statutory route in relation to a s 8 order would have raised various procedural safeguards for the child and the parties which appeared to be bypassed entirely under the inherent jurisdiction.

The mother's argument also noted that the main authority on the correct approach to a summary return order outside the Hague Convention – the well-known decision of Lady Hale's in *Re J* (above) – was itself an application for and order made by way of a specific issue order. It was also argued, in what Lord Wilson called 'the high-point of the mother's case' (para 36), that Practice Direction 12D, para 1.1, made plain that the inherent jurisdiction should only be used where no statutory remedy is available. It states:

'The court may in exercising its inherent jurisdiction make any order or determine any issue in respect of a child unless limited by case law or statute. Such proceedings should not be commenced unless it is clear that the issues concerning the child cannot be resolved under the Children Act 1989.'

The mother's first ground of appeal was not accepted by the Supreme Court.

Lord Wilson was clear that an order for the return of a child to a foreign state is within the bounds of what can be achieved by way of a specific issue order (para 27), and quoted O'Hanlon J's view in the Irish High Court case of *KW v PW* [2016] IEHC 513 that, given the availability of a statutory remedy, the inherent jurisdiction was not available. Nonetheless, his Lordship did not accept that it followed that this was the only mechanism for making such an order. His Lordship noted that, whereas s 100 of the Children Act does impose some significant restrictions on the use of the inherent jurisdiction, Parliament had 'nowhere sought to preclude exercise of the inherent jurisdiction so as to make orders equivalent to those for which sections 8 and 10 [of the Children Act] provide, including specific issue orders' (para 40). In terms of case-law, his Lordship pointed to a number of decisions in the child abduction context (*A v A (Children: Habitual Residence)* [2013] UKSC 60, [2014] AC 1 and *Re L (A Child) (Custody: Habitual Residence)* [2013] UKSC 75, [2014] AC 1017 in particular) in which the court had used the inherent jurisdiction to order children's return. Also, that in *A v A* [2013] Lady Hale had stated specifically that there are a number of areas of child law in which orders can be made either under the Children Act or the inherent jurisdiction.

From this, Lord Wilson concluded that para 1.1 of PD 12D ‘goes too far’, because ‘[t]here is no law which precludes the commencement of an application under the inherent jurisdiction unless the issues “cannot” be resolved under the 1989 Act’ (para 44). Where, as in the case of a return order, the issue can be resolved under either legal mechanism, ‘[a]t the first hearing for directions the judge will need to be persuaded that, exceptionally, it was reasonable for the applicant to attempt to invoke the inherent jurisdiction’ (para 44). Examples of reasons which might justify that invocation include ‘reasons of urgency, of complexity or of the need for particular judicial expertise in the determination of a cross-border issue’ (para 44). In some cases the judge would, his Lordship suggested, refuse to hear the application under the inherent jurisdiction on the basis that it could be resolved under the Act.

It has been well established for many years that in an application in relation to a child’s welfare to which the welfare checklist in s 1(3) does not technically apply the court will nonetheless have regard to those factors listed in the Act as a matter of good practice. This approach is endorsed by the Supreme Court in *Re NY* (para 49). Interestingly, Lord Wilson goes further, and says that the same must be true for the practice guidance provided in relation to domestic abuse and contact in FPR 2010, Practice Direction 12J:

‘as in relation to the welfare check-list, a court ... is likely to find it helpful to consider the requirements of the Practice Direction; and if it is considering whether to make a summary order, it will initially examine whether, in order sufficiently to identify what the child’s welfare requires, it should, in the light of the Practice Direction, conduct an inquiry into the allegations and, if so, how extensive that inquiry should be’ (para 50).

The court’s welfare enquiry

Although the mother had failed to persuade the court of the merits of her first ground of appeal, it is apparent that Lord Wilson was nonetheless keen to ensure that the full ambit of the welfare enquiry required under the inherent jurisdiction is clear, hence his extensive comments about s 1(3) and Practice Direction 12J.

Turning to the welfare assessment conducted by the Court of Appeal, Lord Wilson started by rejecting the suggestion made by that court that it was in effect adopting a welfare analysis conducted by MacDonald J. His Lordship noted that the Court of Appeal ‘well knew that [MacDonald J] had made no such determination or decision but it clearly regarded it as appropriate to deem him to have done so’ (para 23); but, MacDonald J had never been asked to conduct a welfare evaluation, and the closest that he came was in considering the discretion which had arisen, on his analysis, under the Hague Convention. Lord Wilson noted that a consideration of the discretion under the Hague Convention is not made on a welfare basis (para 53).

Lord Wilson considered that the first question for the Court of Appeal should have been whether the mother had sufficient notice of the intention to make an order on that basis. It was not that an order under the inherent jurisdiction formally required an application, because there was ‘no reason to doubt that an order under the inherent jurisdiction ... can also be made of the court’s own motion’ (para 54). Rather, the question was one of procedural fairness (here bringing in the mother’s third ground of appeal):

‘It is sufficient to record significant doubt whether the mother could reasonably have anticipated that, in the event of the success of her appeal, an appellate court, instead of, at most, remitting to the judge consideration of the exercise of the inherent jurisdiction, would itself exercise it even in the absence of material with which to analyse what the child’s welfare required’ (para 54).

Lord Wilson identified a number of factors to which the court ought to have given consideration before reaching the conclusion that a summary return could be ordered. Set out at paragraphs 56 to 63, these are:

1. whether the evidence before the court was sufficiently up to date to enable a summary order to be made;
2. whether the judge had made sufficient findings to justify a summary order;
3. whether an enquiry into the matters on the welfare checklist was required to sufficiently identify the welfare outcome;
4. whether, if allegations of domestic abuse are made, an inquiry should be conducted into the disputed allegations, and if so how extensive that enquiry should be, bearing in mind FPR 2010, Practice Direction 12J;
5. whether, in the absence of information about the arrangements for the child in the other state, especially where she would live, it was appropriate to conclude that her welfare required her return;
6. whether, considering the above factors, oral evidence was required;
7. whether, again considering the above factors, a Cafcass report was required, and, if so, into which issues the officer should be asked to look; and
8. the relative speed with which the courts in each of the two relevant states could address the substantive issues between the parties, and an assurance that the court of the other state has a relocation jurisdiction under which the returning parent could, if she wished, make an application.

Lord Wilson went on to state that the effect of these factors ‘is not to submerge efficient exercise of the inherent jurisdiction to make a summary order within an ocean of onerous judicial obligations’ – because, the obligation is only to consider these factors, not necessarily to act on any or all of them (para 64).

Commentary and analysis

The Supreme Court in *Re NY* has answered a number of important questions. To summarise the key messages from Lord Wilson's judgment:

1. the law permits applications under the inherent jurisdiction of the High Court even when the substantive remedy sought is one that can be achieved equally under the Children Act, so long as the applicant can justify the need for the invocation of that non-statutory jurisdiction;
2. in making a welfare determination under the inherent jurisdiction, the court will normally find it useful to have regard to the factors listed in the welfare checklist in CA 1989 s 1(3), but also, in any case involve allegations of domestic abuse, to the provisions of FPR 2010, Practice Direction 12J;
3. when considering making a determination under the inherent jurisdiction, there are eight key factors to which the court should have regard, primarily designed to ensure that, whether the case is proceeding on a summary basis or otherwise, the evidence before the court is sufficiently robust and focused on the decision in question.

While the Supreme Court was able to explain that the inherent jurisdiction was not explicitly disappplied in circumstances where a s 8 order might otherwise be made, it was less clear why both remedies should remain available. The three reasons suggested by Lord Wilson – urgency, complexity, or international elements to the case – might all apply to an application for a return order (though they might not – many such cases, including this one, are not particularly complex); but they do not necessarily apply to other types of application where both remedies are apparently available. Mostyn J has made the argument in the context of a contested medical procedure that there is no difficulty with use of the Children Act and therefore no need to invoke the inherent jurisdiction (*Re JM (A Child) (Medical Treatment)* [2015] EWHC 2832 (Fam), [2016] 2 FLR 235; for further analysis, see R George, 'The Legal Basis for the Court's Jurisdiction to Authorise Medical Treatment for Children', in I Goold, J Herring and C Auckland (eds) *Parental Rights, Best Interests and Significant Harms*, Bloomsbury, 2019).

Moreover, there are other areas of law, presently dealt with by way of the Children Act, where those same elements might be said to apply in particular cases. For example, international relocation and the placement of children abroad within public law proceedings. It is presumably not the case, though, that an applicant seeking international relocation where there is an argument that the case is urgent, complex and has an international element is entitled to apply under the inherent jurisdiction.

A potentially bigger question left open by the judgment in *Re NY* is why any application for a summary return order, on whatever legal basis and with whatever evidential support, was available on the facts. This was a case where the child's presence in this jurisdiction was not *wrongful*; MacDonald J's conclusion to the contrary was overturned, so by the time the Court of Appeal and the Supreme Court were addressing the case, this was a child whose mother had brought her to this jurisdiction and kept her here without breaching the father's rights of custody. Why, therefore, was the father eligible to seek a summary return order to Israel?

This unanswered question leaves scope for significant arguments to be run in potential relocation cases. While most relocation cases involve children who have been in this jurisdiction for a substantial part of their lives, there are cases where the children have not been in this country for very long. Suppose the facts of *Re NY* had been only slightly different, in that after the parents' relationship broke down it was the mother, not the father, who sought to return to Israel with N, while the father wished himself and N to stay. Had the mother and N gone without permission, N might well (depending on the question of habitual residence) have been returned under the Hague Convention. Certainly, most lawyers in this jurisdiction would have cautioned her strongly against taking a unilateral step to return to Israel without the father's consent or a court order. They would also have advised her that she needed to apply for a specific issue order to permit relocation. The problem arising from *Re NY* is that if a summary return order under the inherent jurisdiction is available even when the child's presence in this jurisdiction is not wrongful, then where is the line? Can a parent apply for summary return any time in the first year of being in this country? Or only the first six months? Or, conversely, in any case where there is urgency, complexity and an international element? Our view has always been that it is the *wrongfulness* of a child abduction that justifies the court's summary welfare jurisdiction in non-Convention cases, but *Re NY* does not say this and the Supreme Court does not appear to have considered that the return order sought was in any way contingent on the child's presence here being wrongful. This is a significant issue, and one which will require further examination from the courts to clarify.