



Neutral Citation Number: [2022] EWCA Civ 1118

Case No: CA-2022-001268

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mrs Justice Lieven
NNC21C00023

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05 August 2022

Before :

LORD JUSTICE BEAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE DINGEMANS

W-A (Children: Foreign Conviction)

Aidan Vine QC and Alex Forbes (instructed by **Jackson West Solicitors**) for the **Appellant**
Nick Goodwin QC and Stuart Yeung (instructed by **Pathfinder Legal Services Limited**) for
the **Respondent Local Authority**

Sam Momtaz QC and Samantha Dunn (instructed by **Wilson Browne Solicitors**) for the
Respondent Mother

Andrew Norton QC and Christopher Adams (instructed by **Sills & Betteridge LLP**) for the
Respondent Children through their Children's Guardian

Hearing date: 19 July 2022

Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. This appeal arises in the course of care proceedings concerning two girls, aged 16 and 11. The appellant is their mother's husband ('MH'). He appeals from a ruling made by Mrs Justice Lieven on 21 June 2022 that his conviction for sexual offences against a child in a Spanish court is admissible in the care proceedings as evidence with presumptive weight, so that the fact of the conviction will stand as proof of the facts underlying it unless MH rebuts that presumption on the balance of probability. The effect of the ruling is that in these family proceedings the foreign conviction will be treated in the same way as if it was a conviction of a court in the United Kingdom.
2. MH's central argument is that the decision of this court in *Hollington v Hewthorn* [1943] 2 All ER 35; [1943] 1 KB 587 bound the judge and binds this court to reach the opposite conclusion, namely that the Spanish conviction is not admissible in evidence and that in consequence the burden remains on the local authority to prove the facts underlying the conviction in the same way as if he had never been convicted.
3. The question of the admissibility of a foreign conviction has not previously arisen in family proceedings. On 7 July, I gave permission to appeal and on 19 July we heard the appeal. We are grateful for the efficient way in which it has been prepared and presented. At the end of the hearing we informed the parties that the appeal would be dismissed and I now give my reasons for joining in that decision.

The background

4. On an occasion in August 2008, MH, then aged 44, babysat an 11 year old girl. In February 2011, he was convicted at the Provincial Court Section No. 7 of Elche/Elx, Spain, of sexually abusing the child by showing her pornographic images on his phone, touching her vagina and penetrating her with his finger. He received a sentence of 5½ years imprisonment. His appeal was unsuccessful. He was released from custody in February 2017. He returned to the United Kingdom and in August 2017 he was made the subject of an indefinite notification order pursuant to section 96A of the Sexual Offences Act 2003, which made specific provision for notification requirements to apply to those convicted in foreign courts of relevant offences as if he had been convicted in the United Kingdom. In June 2019 he was convicted of failing to comply with the notification order and he received a community order and a rehabilitation activity requirement.
5. In October 2020 MH met the mother online and in January 2021 he moved in with her and her children. On learning of this, the local authority began proceedings in February 2021. Interim care orders were made and the children were placed together in foster care, where they remain. In June 2021 the mother and MH married. At present, neither child wishes to return to live with their mother whilst MH remains in the house. In August 2021, he was joined as a party to the care proceedings.
6. As the proceedings progressed, a number of assessments were necessary and an Issues Resolution Hearing could not take place until April 2022. It was only then that counsel for MH raised the issue of the admissibility of the Spanish conviction, which had previously been generally assumed to be admissible and had formed the basis for the assessments that had been carried out. The matter was transferred to the High Court and listed before Lieven J, who heard submissions on 6 June and gave judgment on 21 June.

Family proceedings

7. Although the present appeal arises in a public law context under Part IV of the Act, the same issue may arise in a private law case under Part I, or in a case under the inherent jurisdiction relating to children, or indeed in a welfare case under the Mental Capacity Act 2005, and I have all of them in mind when I refer to family proceedings. Financial remedy proceedings are also family proceedings, but are beyond the scope of this judgment.
8. The modern touchstone for the admissibility of evidence is relevance, whereby proof of one fact makes probable the existence of another. When considering whether evidence is relevant, the starting point must be the nature of the proceedings in which the question arises. The purpose of family proceedings is the protection of children and the promotion of their welfare and it is a fundamental principle that the court will take account of all the circumstances of the case, as stated by Hollings J in *In re H (A Minor)* [1982] Fam at 132:

“When welfare considerations apply, where the welfare of the minor is paramount... the very welfare of the minor dictates that regard must be had to every matter which bears upon a possible risk or benefit to the child...”

This is reflected in s. 1(3) the Children Act 1989, which requires the court to have regard *in particular* to the factors in the welfare checklist.
9. One checklist factor is any harm which the child has suffered or is at risk of suffering. This calls for a risk assessment in the light of findings of fact arrived at in the normal way, with the burden of proof being on the party seeking a finding to prove it on a balance of probability. The obligation to take account of all the circumstances means that the court is not confined by the way in which the parties put their cases. Provided procedural fairness is observed, it has complete control of the process, which is aptly described as quasi-inquisitorial.
10. The proviso concerning procedural fairness is of course important. Natural justice and Art. 6 ECHR sound as clearly in family proceedings as in any other context. At the same time, there will be circumstances in which perfect fairness to all parties cannot be achieved and the court must protect each competing interest to the greatest possible extent, having regard to the purpose of the proceedings themselves. The rights and interests of the child will generally predominate where they conflict with the interests of others, but there is always a balance to be struck.
11. The present case offers a clear illustration of this tension. The central issue is whether MH poses a sexual risk to children. The incident that led to the Spanish conviction is the lynchpin of the local authority’s case. MH accepts that he was convicted but says that he was not guilty. He also argues that his trial (at which he and the child gave evidence) was unfair in a number of ways. He has produced a certain amount of documentation surrounding his conviction and more may be available by the time of the final hearing. However, the question of admissibility cannot turn on the attitude of the parties or the availability of surrounding information and the matter must be approached as if this was a bare conviction.
12. Accordingly, when the case is finally heard there are two possibilities. The first is that the conviction is not admitted and the local authority is required to prove the allegation of sexual abuse as if there had been no conviction. That may be

impossible, given the length of time that has passed, and in consequence the threshold may not be crossed with the result that the proceedings would founder. The second possibility is that the conviction is admitted, with MH having the opportunity to persuade the court that it should not rely upon it; again, that may not be easy. It is therefore necessary to select the outcome that is more consistent with the purpose of the proceedings themselves.

13. Family proceedings involve a fact-finding element, on the basis of which assessments and decisions are made. In care proceedings, proof of the significant harm threshold is a precondition for the court to exercise its powers and it has been said that, while the proceedings overall are essentially inquisitorial, they are necessarily adversarial in that respect: *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5; [2013] 1 FLR 1250 at [70] (Sir James Munby P). However, the fact-finding element of the process cannot be isolated from the welfare decision it informs. In this respect the position differs from other kinds of civil proceedings, as reflected in the respective procedural rules. The overriding objective under the Civil Procedure Rules is to enable the court to deal with cases justly and at proportionate cost, while under the Family Procedure Rules it is to enable the court to deal with cases justly, having regard to any welfare issues involved.
14. The characteristics of family proceedings therefore speak strongly against the existence of artificial evidential constraints that may defeat the purpose of the jurisdiction.

Previous judicial findings

15. Against this background I turn to the question of the use of previous judicial findings in family proceedings. It is commonplace for there to have been previous family proceedings involving more than one of the parties and for the findings in those proceedings to be admitted as evidence in the later proceedings. There are many permutations. As Hale J said in *In re B (Minors) (Care Proceedings: Issue Estoppel)* [1997] Fam 117; [1997] 3 WLR 1; [1997] 2 All ER 29; [1997] 1 FLR 285:

“It then frequently arises that findings made in one set of proceedings are relevant, even crucial, in another. At one end of the spectrum, exactly the same parties are involved: findings are made in care proceedings when a care order is made, and will be relevant in later proceedings to discharge the care order. Then come cases involving the same child but different parties: the most obvious example is an adoption application relating to a child in care; but another example would be care proceedings relating to a child after a finding of sexual abuse had been made in private law proceedings between his parents; or vice versa, where private law proceedings follow care proceedings. Then come cases involving different children; in these the adult parties may be identical, if they are children of the same two parents; but it is perhaps more likely that they will not be entirely identical, as different parents may be involved. In some of these, the applicant local authority, who may loosely be termed the accuser, and the respondent parent, who may loosely be termed the accused, are the same, as happens to be the situation here. In others, a completely different local authority may be involved.”

16. The question that was posed in *Re B* was whether, in care proceedings concerning his own children, a father was bound by a finding of sexual abuse made against him in care proceedings relating to other children. Hale J noted that the matter was of great practical importance in the family jurisdiction and that it concerned not only sexual abuse but any finding of fact relevant to a person's suitability to care for children. She held that there is no strict rule of issue estoppel binding any of the parties in cases concerning children. Children proceedings are inquisitorial in nature and the court has a discretion as to how it conducts its inquiry. It was a matter for the court to decide whether to allow any issue of fact to be tried afresh. The father was not as a matter of law estopped from challenging the earlier finding and the trial judge would have to decide how the allegation was to be proved. The answer to the question posed was 'not necessarily'.
17. The decision in *Re B* has consistently been followed at first instance and has been approved by this court, for example in *Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447, [2020] 1 FLR 162. Its interest for our purposes is that nobody even contemplated that the previous finding would not be admissible in evidence, whether under the rule in *Hollington v Hewthorn* or under the principle of *res inter alios acta*, whereby a judgment obtained by A against B is not admissible as evidence against C. The question was not whether the previous finding was admissible but whether it was binding. As in the present case (until it had been running for 14 months) no one thought to suggest that the previous finding was not relevant or admissible. The same general understanding certainly dates back to the Children Act and probably long before that.
18. It is therefore settled law in family proceedings that the findings of previous tribunals may be admitted in evidence and that the court will give such weight to the earlier finding as it considers appropriate in the circumstances of the case, while remaining alert to the need for fairness to all parties in the procedure it adopts. No distinction is drawn between domestic and foreign findings and convictions, though the weight that will be given in each case may vary, depending upon the process that led to the previous outcome.
19. Any other approach would severely conflict with the court's overriding duty to get at the truth in the interests of the child and would in many cases lead to absurdity. While the same could be said for non-sexual convictions and civil findings, the present case offers a particularly clear example. The factual question for the Spanish court was whether MH had engaged in sexual activity with a child. The factual question in the present proceedings is exactly the same. He has spent half of the past decade in custody. He is, by virtue of the Sexual Offences Act 2003, a registered sex offender. His offences are recorded on the Police National Computer and on a UKCA-ECR certificate. He has a conviction for the breach of a notification requirement arising from his foreign conviction. For the family court to refuse to admit the conviction lying at the root of all this into evidence would be to blind itself to reality.
20. As matter of principle, I would therefore hold that the criminal conviction is plainly relevant evidence that is admissible in the care proceedings. I turn to consider whether we are bound by authority to reach a different conclusion. I can immediately say that in my view we are not. As I have explained, the rules of evidence in family proceedings are different to those in other kinds of civil proceedings because the rights and interests at stake are different. It might be said that family proceedings represent an exception to the rules of admissibility that apply in civil proceedings, but

the better analysis is that the purpose of rules of evidence is to achieve justice, not injustice, and that strict evidentiary rules such as *res inter alios acta*, estoppel and the rule in *Hollington v Hewthorn* have never applied in this welfare-based jurisdiction.

The judge's decision

21. I therefore agree with the judge when she said:

“58. In my view, *Hollington* is not binding upon the Court in the present case. The most simple analysis is that it was not a case concerned with the statutory scheme under Part IV of the Children Act 1989. The law on the admissibility of evidence and the legal considerations under the CA are very different from those in issue in 1943 in *Hollington*.

59. *Hollington* concerned inter partes litigation where there was no broader public interest (other of course than the administration of justice more widely). Part IV CA proceedings are very different, at their heart lies the welfare of the child and the Court's duty under section 1 to consider that welfare. Although at this stage of proceedings the child's welfare is not paramount, it is a highly material consideration, and one that is central to the statutory scheme.

60. Therefore, the considerations that were central to *Hollington*, and are set out in the Court's reasoning, are very different in the present case. It is by reason of that public interest in the protection of children that the court in Part IV proceedings has a quasi-inquisitorial role, see Ryder LJ in *Re W (Care Proceedings: Functions of the Court and Local Authority)* [2013] EWCA Civ 1227:

“Although it is conventional to speak of facts having to be proved on the balance of probabilities by the party who makes the allegation, proceedings under the CA 1989 are quasi-inquisitorial (quasi-inquisitorial in the classic sense that the court does not issue the process of its own motion).”

61. For this reason, the court will rarely exclude relevant evidence. There is no dispute in this case that the evidence is highly relevant. It is important when considering the welfare interests of the children that it would be extremely difficult to prove to the English Court the facts behind the convictions. The events took place some years ago in Spain. Although [MH] is a compellable witness, if he completely denies the offences it will be extremely difficult for the LA to establish those facts if it cannot rely on the convictions and if the burden of proof rests on the LA.”

22. The judge went on to give two other reasons for distinguishing *Hollington v Hewthorn*: that an important part of the court's reasoning was that the two courts were not considering identical facts; and that the decision rested to an extent on *res inter alios acta* and the issue of fairness to third parties, here the mother. She added a final reason, namely the absurdity of the position that would otherwise arise in this case,

where MH has a conviction for breach of an order that can only apply to sex offenders.

23. In my view the judge's first reason for her ruling is correct and sufficient. As to her second and third reasons, in order to decide whether *Hollington v Hewthorn* can dependably be distinguished on those grounds one would need to be clear about what it actually decides. As we will see, that is not easy.
24. To conclude this account of the judgment, the judge gave two reasons why she would not choose to exclude the evidence of the conviction if it was a matter of discretion:

“69. ... the law on foreign judgments has moved on enormously since 1968, and the degree both of procedural safeguards, certainly within Council of Europe States, and of principles of comity are quite different now.

70. There are likely to be very significant differences between a criminal trial undertaken in a Council of Europe State, bound by ECHR principles, and the potential for a show trial in a State without what would be regarded as sufficient judicial protections. It would be entirely open to the English Court to put little weight on findings in the latter situation, and the burden on an individual to displace any findings of fact would in practice be much lower.

71. Further, as I have said, if the Spanish convictions cannot be taken into account to establish the underlying facts, then the LA would find it very hard to prove their threshold. There is a real risk that this would then put the children in the case at risk of significant harm.”

25. Finally, the judge addressed the consequences of admitting the conviction. She rejected MH's argument that even if the conviction itself could be taken into account, the burden would still be on the local authority to prove the facts. However:

“72. It is important at this stage to be clear that it is not being suggested that the Spanish convictions will be binding on the Court. It will be entirely open to [MH] to give evidence both as to why he did not carry out the actions found and that the criminal justice process that led to the convictions was unfair.”

Hollington v Hewthorn

26. In a road traffic action, the plaintiff car-owner alleged negligence and sought to give evidence of the defendant driver's conviction for careless driving. The conviction was important for the plaintiff's case because the driver of his car (his son) had died before the action began. In a judgment given by Goddard LJ, the Court of Appeal upheld the trial judge's ruling that the conviction was inadmissible.
27. There are in my analysis at least two intertwined strands to the court's reasoning. It held that the conviction was not relevant because it was not possible to tell what it proved, the issues in the criminal proceedings not being identical to those in the civil proceedings. To link the criminal verdict to civil negligence would require the court

to hear substantially the same evidence. Otherwise, a conviction is no more than inadmissible evidence of the opinion of the other court (pp.594-5):

“Is it, then, relevant to an issue whether the defendant, by negligent driving, collided with and thereby injured the plaintiff, to prove that he had been convicted of driving without due care and attention on the occasion when the plaintiff was injured? As stated above, Mr. Denning admits that he would have to identify the negligent driving which formed the subject of the charge with that which caused the injury to the plaintiff, for the record of the conviction itself would show no more than that the defendant was convicted for so driving on a certain day and in a certain parish or place. In truth, the conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages. Assume that evidence is called to prove that the defendant did collide with the plaintiff, that has only an evidential value on the issue whether the defendant, by driving carelessly, caused damage to the plaintiff. To link up or identify the careless driving with the accident, it would be necessary in most cases, probably in all, to call substantially the same evidence before the court trying the claim for personal injuries, and so proof of the conviction by itself would amount to no more than proof that the criminal court came to the conclusion that the defendant was guilty. It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper, but it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result. It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant.”

28. The second strand of reasoning arises from the principle *res inter alios acta*, by which a judgment obtained by A against B is not admissible as evidence against C. It was on that ground that the trial judge had ruled the conviction inadmissible, but on the

facts of the case before it the Court of Appeal instead stressed (at p. 598) the question of relevancy as being at the root of the objection to the admissibility of the evidence. It nevertheless continued:

“Other reasons can, of course, be given for the rule, and in other cases would have great force. A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the *Duchess of Kingston's Case* (1776) 2 Sin. L. C, 13th ed., 644, “it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore . . . the judgment of the court upon facts found, although evidence against the parties, and all claiming, under them, are not, in general, to be used to the prejudice of strangers.” This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case. A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state is a fact in issue.”

29. In concluding, the court remarked (at p. 601) that if convictions could be admitted, so could acquittals, and that “this only goes to show that the court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case”. Its last word on the issue was that:

“In many, perhaps in most, cases the correctness of the conviction would not be questioned, but where it is, its value can only be assessed by a retrial on the same evidence. However convenient the other course may be, it is, in our opinion, safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal.”

30. I would therefore summarise the decisive reasoning in *Hollington v Hewthorn* as being that the interests of justice require a court to reach its own conclusion about the issue before it without regard to the conclusions of others, unless they are expert witnesses in the usual sense, because (1) without retrying the matter it is not possible to know what the earlier decision proved, and (2) it would be unfair if third parties were prejudiced by decisions to which they were not a party.
31. The decision in *Hollington v Hewthorn* has been subject to much analysis and criticism in the past 80 years, and its reasoning has repeatedly been studied, including by Lieven J in the present case. In another full examination in *Rogers v Hoyle* [2013] EWHC 1409, Leggatt J said this at [93] and at [104]:

“The underlying rationale in my view, albeit not clearly spelt out in the judgment of the Court of Appeal, is the rationale to which I referred earlier for the exclusion of opinion evidence in general: namely, that it is the duty of a court to form its own opinion on the basis of the evidence placed before it; and that it would not be proper for the court in forming that opinion to be influenced by the opinion of someone else, however reliable that person’s opinion is likely to be. In so far as the evidence before the later court is the same as the evidence before the earlier court, the later court is in as good a position to draw inferences and conclusions from the evidence. In so far as the evidence is different, the opinion of the earlier court does not assist the court’s task.”

“As in the case of the rule which excludes opinion evidence generally, therefore, the true justification for the rule in Hollington v Hewthorn, as I see it, is not that the opinion of an earlier court is irrelevant but lies in the requirements for a fair trial. The responsibility of a judge to make his or her own independent assessment of the evidence entails that weight ought not to be attached to conclusions reached by another judge – all the more so where the party to whose interests the conclusions are adverse was not a party to the earlier proceedings. That, I think, was the principle which the Court of Appeal was expounding in Hollington v Hewthorn.”

32. On appeal, at [2014] EWCA Civ 1409, Christopher Clarke LJ agreed:

[39] As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision-maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it (the trial judge), and not another. ... The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard.

[40] In essence, as the judge rightly said, the foundation of the rule must now be the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone.”

33. Another valuable treatment of the question appears in the judgment of Tugendhat J in *Director of the Assets Recovery Agency v Virtosu* [2008] EWHC 149 QB at [32-46], where he distinguished *Hollington v Hewthorn* on the basis that a French conviction proved the identical matter to the matter in question in the English proceedings. He also noted that the law of evidence had developed very considerably with the admission of hearsay evidence since the Civil Evidence Act 1995, and that the credit given to the judgments of foreign courts had changed greatly over the years, in particular in relation to the courts of countries which are members of the Council of Europe, and who are thus subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

34. In *Caylon v Michailaidis* [2009] UKPC 34 (PC) at [27], Lord Rodger briskly described the essential reasoning in *Hollington v Hewthorn* as being that unless the second court goes into the facts for itself, it cannot actually tell what weight it should properly attach to the previous decision, meaning that the previous decision itself cannot be relied upon.
35. In my view descriptions of the *ratio decidendi* of *Hollington v Hewthorn* rather depend upon the degree of generality with which the question is approached and the nature of the case in which the question is being asked. It can be argued, as the judge did here, that the rule cannot apply where it is possible to know what the earlier decision proved because the issues are identical, and when it would *not* cause unfair prejudice to third parties to admit the earlier decision. If it was necessary to do so, I might be prepared to distinguish *Hollington v Hewthorne* on that basis, but the distinction may not hold in other cases. In the end the fundamental point is that the rule does not apply at all to the type of proceedings with which we are concerned.

Subsequent events

36. The actual decision in *Hollington v Hewthorn* was reversed by the Civil Evidence Act 1968, which provides at s.11 that in any civil proceedings the fact that a person has been convicted of an offence by any court in the United Kingdom shall be admissible for the purpose of proving that he committed that offence, unless the contrary is proved. On the same basis, s.12 admits findings of adultery or paternity by a court in England and Wales and s.13 admits United Kingdom convictions in defamation actions. However, the Law Reform Committee in its Fifteenth Report (“The Rule in *Hollington v Hewthorn*”, Cmnd 3391, 1967), did not recommend the abolition of the rule in relation to findings made in civil proceedings, nor its abolition in relation to foreign convictions. At paragraph 17 they said:

“We have restricted our recommendation to convictions by courts of competent jurisdiction in the United Kingdom. We do not include convictions by foreign courts. This is for practical reasons. The substantive criminal law varies widely in different countries. So does criminal procedure and the law of evidence. The relevance of the foreign conviction to the issues in the English civil action could not be ascertained without expert evidence of the substantive criminal law of the foreign country. Its weight could not be judged without expert evidence of the procedural law of the foreign country and reliable information as to the standards of its courts. There are, of course, many countries whose standard of the administration of criminal justice is as high as our own, but there are others in which one cannot be assured of this. It would be invidious to leave the admissibility and weight of a foreign conviction to the discretion of an English judge unfamiliar with the legal system and standards of criminal justice of the foreign country concerned. Furthermore, the burden of showing that a foreign conviction was erroneous would be difficult, perhaps impossible, to sustain, since there would be no way of compelling the witnesses in the foreign criminal proceedings to attend to give evidence in the English courts. The practical effect of making foreign convictions admissible might well be to make them conclusive and the remoter the country in which

the conviction took place the more difficult it would be to dispute its correctness”.

37. A number of exceptions to the rule have been created or proposed, either by statute or regulation or in subsequent cases:
- Where the Criminal Justice Act 2003 has provided that foreign convictions are admissible as evidence of bad character: *R v Kordasinski* [2006] EWCA Crim 2984; [2007] 1 Cr App R 17.
 - Where the Sexual Offences Act 2003 makes provision for those with relevant foreign convictions to be the subject of notification requirements.
 - Where a statutory instrument explicitly provides for the admissibility of a foreign conviction, for example The General Medical Council (Fitness to Practise) Rules 2004, rule 34(3), and see *Re a solicitor* [1992] 2 AER 335 (DC).
 - In proceedings for civil recovery under the Proceeds of Crime Act 2002 where a foreign conviction establishes the identical matter required to be established in the recovery proceedings: *Director of the Assets Recovery Agency v Virtosu* [2008] EWHC 149 QB (Tugendhat J).
 - Where the judgment or decision is considered to be the opinion of an expert or an expert tribunal: *Rogers v Hoyle* [2013] EWHC 1409 (Leggatt J) and *Hoyle v Rogers* [2014] EWCA Civ 257; [2014] 3 All ER 550 (CA).
 - In financial remedy proceedings: *Richardson-Ruhan v Ruhan* [2017] EWHC 2739 (Fam); [2018] 1 FCR 720 (Mostyn J).
 - In regulatory proceedings where the rules of evidence are expressly relaxed: *Towuaghantse v General Medical Council* [2021] EWHC 681 (Admin) (Mostyn J).
38. At the same time, the rule has continued to be applied in these circumstances, making inadmissible:
- Previous convictions in subsequent prosecutions: *Hui Chi-Ming v the Queen* [1992] 1 AC 34 (PC)
 - An arbitration award in a later arbitration: *Land Securities plc v Westminster City Council* [1993] 1 WLR 286 (Hoffmann J)
 - Inquiry findings in civil proceedings: *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 (HL)
 - A civil finding in director’s disqualification proceedings: *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 (CA)
 - Family court findings of fact in criminal proceedings: *R v Levey* [2006] EWCA Crim 1902
 - Findings of a disciplinary tribunal in a civil action: *Conlon v Simms* [2008] 1 WLR 484 (CA)

- A foreign judgment in civil proceedings: *Caylon v Michailaidis* [2009] UKPC 34 (PC), *Crypto Open Patent Alliance v Wright* [2021] EWHC 3440 (Ch) (HHJ Matthews)
 - A foreign conviction in civil proceedings: *Daley v Bakiyev* [2016] EWHC 1972 (Supperstone J) and *Benyatov v Credit Suisse Securities (Europe) Limited* [2022] EWHC 135 (Freedman J)
 - A declaration in civil proceedings in a subsequent tracing claim against a non-party: *Ward v Savill* [2021] EWCA Civ 1378.
39. A number of these cases concerned foreign convictions (*Kordasinski, Virtuso, Daley, Bakiyev*) or civil findings (*Caylon, Crypto*) but the only instances of consideration being given to this issue in family proceedings are a passing remark in the financial remedy case of *Richardson-Ruhan* and the decision in *Bailey v Bailey* [2022] EWFC 5, where Peel J had no difficulty in rejecting a submission that the rule in *Hollington v Hewthorn* requires a court hearing committal proceedings to ignore the decision from which the breach was said to arise. It is notable that the appellant's argument, to which I now turn, has never previously been made in a case concerning children.

The submissions

40. As we are concerned with a pure point of law, the arguments we heard were very similar to those addressed to the judge.
41. On behalf of MH, Mr Vine QC and Mr Forbes advance three grounds of appeal:
- i) The judge was wrong to find that *Hollington v Hewthorn* was not binding and could be distinguished.
 - ii) If the court had a residual discretion, the judge placed inappropriate weight on considerations of comity and evidential difficulty for the local authority.
 - iii) If foreign convictions are admissible, the judge was wrong in law to hold that they carry presumptive weight.
42. In relation to the first ground, Mr Vine submits that the rule in *Hollington in Hewthorn* remains good law, as confirmed in Phipson on Evidence 19th ed. 43-79, where it is stated that it is safe to say that the rule still applies in all cases not covered by a common law exception or the various statutory exceptions. He does not shy away from asserting that the law requires no weight at all to be given to the foreign conviction. The decision of this court in *Hoyle v Rogers* shows that the underlying documentation underlying MH's conviction will be admissible, but the verdict itself is no more than inadmissible evidence of the opinion of the Spanish court.
43. Mr Vine argues that there is no authority for the proposition that the rule does not apply to children's cases, or that they constitute an exception. Further, even if proceedings under the Children Act have a quasi-inquisitorial character, that does not apply to the fact-finding element: *Re TG*. He further observes that the Spanish convictions were not *res inter alios acta* in respect of either the mother or the children. Even if the issues in the proceedings can be said to be the same, the objections based on fairness and decision-making on ultimate issues still remain. If the conclusion reached by the judge stands, how is the court to know what weight to give to the foreign conviction?

44. On the second ground, Mr Vine argues that the judge was wrong to give weight to issues of confidence in foreign procedures or comity. The court was considering admissibility, not recognition and enforcement. Nor should the decision have been swayed by the evidential difficulties faced by the local authority. Procedure and outcome should not be elided.
45. On the third ground, Mr Vine submitted that if the conviction was admitted, the onus of proof should still remain on the local authority. The conviction will be “just another piece of evidence”. He proposed an analogy with cases where the court has decided to reopen a previous finding of fact under the procedure identified in *Re E* (above), at which point the burden of proof remains with the local authority.
46. On behalf of the mother, Mr Momtaz QC and Ms Dunn make a different submission. They do not contend that the conviction is inadmissible, but they argue that there are sound reasons for not equating foreign convictions with domestic convictions. The principle that he who asserts must prove is an important one that should not lightly be displaced. As the Law Reform Committee remarked, the difficulties of disproof might in effect make a foreign conviction conclusive. The burden of proof should therefore remain with the local authority. The mother has an important interest in the outcome and wishes to know whether the Spanish conviction was a miscarriage of justice, as MH has assured her it was.
47. For the local authority, Mr Goodwin QC and Mr Yeung argue that the judge’s reasoning should be upheld. The decision in *Hollington v Hewthorn* was never intended to govern child protection cases. They draw attention to s.1(4)(a) of the Rehabilitation of Offenders Act 1974, which equates foreign convictions with domestic convictions and s.7(2)(cc) of the same Act, which provides in express terms that foreign convictions are admissible in proceedings under the Children Act. They say that this is a clear indication of Parliament’s intention in relation to foreign convictions in cases concerning children.
48. For the Children’s Guardian, Mr Norton QC and Mr Adams endorse the local authority’s submissions. As a further indication of parliamentary intention, they note that the Sexual Offences Act 2003 was amended in 2014 by adding ss.96A and 96AA, which introduce notification requirements for those convicted of sexual offences within member states of the Council of Europe and non-member states respectively. Overall, they point to the anomaly that arises if child protection legislation that protects the wider community cannot do the same for children who are at the heart of family proceedings.
49. After this selective account of the high-quality written and oral submissions, I will summarise my conclusions.

Conclusions

50. The rule in *Hollington v Hewthorn* does not apply in family proceedings as I have defined them because such a rule is incompatible with the welfare-based and protective character of the proceedings.
51. In family proceedings all relevant evidence is admissible. Where previous judicial findings or convictions, whether domestic or foreign, are relevant to a person’s suitability to care for children or some other issue in the case, the court may admit them in evidence.

52. The effect of the admission of a previous finding or conviction is that it will stand as presumptive proof of the underlying facts, but it will not be conclusive and it will be open to a party to establish on a balance of probability that it should not be relied upon. The court will have regard to all the evidence when reaching its conclusion on the issues before it.
53. In this case the judge was right to find that the conviction of MH is plainly relevant evidence in these proceedings and that there is no rule of evidence that makes it inadmissible. As Leggatt J said in the civil context of *Rogers v Hoyle* at [27], the modern approach is that judges can be trusted to evaluate evidence in a rational manner, and that the ability of tribunals to find the true facts will be hindered and not helped if they are prevented from taking relevant evidence into account by exclusionary rules. This is all the more so in family proceedings, where exclusionary rules such as estoppel, *res inter alios acta* and *Hollington v Hewthorn* do not apply because they would not serve the interests of children and their families or the interests of justice.
54. As I have said, while it might be possible to distinguish the present case from *Hollington v Hewthorn* on the basis of identity of issues and lack of unfairness to third parties, it is unnecessary to found the analysis on these narrower and more contestable matters that depend on identifying the true *ratio* of the decision. Nor do I attach special significance to the inquisitorial nature of the proceedings. The important consideration is not that family proceedings are inquisitorial in form but that they are welfare-based in substance.
55. The outcome is not unfair to the mother. As the judge said, she is not in a position to give evidence that is relevant to the conviction. It is not conclusive and she will have an opportunity to examine any surrounding evidence.
56. On the basis that the conviction was admissible, the judge was right to admit it. Indeed there could have been no good reason to refuse. She asked whether it was appropriate to depart from *Hollington v Hewthorn*, but as she had held it to be both inapplicable and distinguishable, the real question was whether there was some other reason to exclude the evidence, and there was none. Accordingly the question of comity is not relevant, while the circumstances of the original finding or conviction and the difficulties of proof in an individual case are matters for the court to keep in mind when it comes to weigh the evidence as a whole.
57. Once a conviction is admitted it inevitably becomes evidence with presumptive weight, otherwise there would be no purpose in admitting it. It would be meaningless to treat it as “just another piece of evidence”. Further, the court’s power to reopen its own findings has no application to the question of how the findings of other tribunals should be treated.
58. For these reasons, which are similar to those given by the judge, I would reject each of the grounds of appeal and dismiss the appeal.

Lord Justice Dingemans

59. I agree with both judgments.

Lord Justice Bean

60. Peter Jackson LJ has given in his judgment a compelling analysis of why a foreign conviction should, as a matter of principle, be admissible and given presumptive weight in proceedings under the Children Act 1989; and why there is nothing in *Hollington v Hewthorn* which requires us to hold otherwise. I agree with him entirely, and I too would dismiss the appeal.
 61. As to the point of principle, no one in this case has argued that MH's conviction in Spain should be conclusive. But the suggestion that it should not even be *admissible* is alarming. It is not difficult to imagine a care case in which a relevant party has been convicted of a serious sexual or violent offence in a foreign court, but the English court has no independent evidence of the facts on which the conviction was based. It cannot be right that in such a case the family court in England and Wales deciding issues relating to the welfare of children should have to ignore the conviction and somehow pretend that the relevant party is of entirely good character and that the offences of which he was convicted never happened.
 62. As to the rule in *Hollington v Hewthorn*, in their 1967 report the Law Reform Committee observed that "rationalise it how one will, the decision in this case offends one's sense of justice"; and that "it is not easy to escape the implication in the rule in *Hollington v Hewthorn* that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right". They made recommendations in respect of convictions by UK courts which Parliament promptly enacted in the Civil Evidence Act 1968. However, in paragraph 17 of their report, cited above by Peter Jackson LJ, the Committee recommended no change to make foreign convictions admissible.
 63. It is unnecessary for us in this case to decide anything about the admissibility of foreign convictions in English civil courts. In civil proceedings the doctrine of precedent may require this court to follow *Hollington v Hewthorn* without question, even though in *Hunter v Chief Constable of West Midlands* [1982] AC 529 at 543 Lord Diplock (with whom the other members of the House of Lords agreed) said that it "is generally considered to have been wrongly decided". But for my part I suggest that, half a century on, the reasoning in paragraph 17 of the Law Reform Committee's 1967 report requires re-examination. Either the surviving effect of *Hollington v Hewthorn* as a whole, or (more narrowly) the question of the admissibility of foreign convictions in English court proceedings, would be a very suitable topic for consideration by the Committee's successors, the Law Commission of England and Wales, either on a reference by the Lord Chancellor or as part of the Commission's next Programme of law reform.
-