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Case No: CA-2023-001003 and 001003A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT DERBY
HH Judge Williscroft
DE22C50190

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 July 2023

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE NEWEY
and
LORD JUSTICE BAKER

Y AND E (1996 HAGUE CONVENTION: ARTICLE 11)

Stefano Nuvoloni KC and Faye Edwards (instructed by **Local Authority Solicitor**) for the
Appellant

Hannah Markham KC (instructed by **JMW Solicitors LLP**) for the **First Respondent**

Patrick Bowe (instructed by **Eddowes Waldron**) for the **Second Respondent**

Andrew Bagchi KC and Anne Williams (instructed by **Kieran Clarke Green**) for the **Third**
and Fourth Respondents, by their children's guardian

Hearing date : 21 June 2023

Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 12 July 2023.

LORD JUSTICE BAKER :

1. On 21 June 2023, we heard an appeal by a local authority against an order discharging an interim care order in respect of two children, a boy, hereafter called Y, aged 8, and his sister, E, aged 4. At the conclusion of the hearing, we informed the parties that the appeal would be allowed, and we made orders summarised below. This judgment explains my reasons for agreeing with that decision.

The 1996 Hague Convention

2. The appeal involves the application of provisions relating to jurisdiction in Chapter II of the 1996 Hague Convention on the jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (“the Convention”). Since the departure of the UK from the European Union, the determination of jurisdiction in children’s proceedings as between States is governed by the Convention rather than the EU Brussels IIA regulation. The two countries involved in this case, the UK and Spain, are both signatories to the Convention. The Convention is incorporated into our domestic law by s.1 of the Private International Law (Implementation of Agreements) Act 2020, which amended the Civil Jurisdiction and Judges Act 1982 so that s.3C(1) of the latter act provides simply that “The 1996 Hague Convention shall have the force of law in the United Kingdom.”

3. Article 5(1) of the Convention lays down the basic rule:

“The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.”

4. Article 6, concerning refugee children, and Article 7, relating to abducted children, are not relevant to this appeal. Articles 8 and 9 concern requests for the transfer of jurisdiction to a State better placed to assess the child’s best interests. They read as follows:

“Article 8

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either – request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or – suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

- a) a State of which the child is a national,
- b) a State in which property of the child is located,

c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,

d) a State with which the child has a substantial connection.

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Article 9

(1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either – request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or – invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.

(2) The authorities concerned may proceed to an exchange of views.

(3) The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.”

5. Article 10 concerns children whose parents are in divorce or separation proceedings and is also not relevant here. Article 11 concerns urgent cases. It provides:

“(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question”.

6. Article 12 makes provision for “measures of a provisional character”. It provides:

“(1) Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.”

7. The mechanism in this jurisdiction by which a local authority may take “necessary measures of protection” in an urgent case under Article 11 or “measures of a provisional character” under Article 12 is provided under regulation 5 of the Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Northern Ireland) Regulations 2010, SI 2010/1898 (“the 2010 Regulations”). Under regulation 5(1):

“This regulation applies where—

(a) a local authority in England and Wales thinks that the conditions in section 31(2)(a) and (b) of the Children Act 1989 (threshold for care and supervision orders) apply in relation to a child, and

(b) one of the following applies in relation to the child—

(i) Article 11 of the Convention (measures of protection in cases of urgency),

(ii) Article 12 of the Convention (measures of a provisional character).”

8. When engaged by regulation 5(1), the effect of regulation 5(2) of the 2010 Regulations is that s.38 of the Children Act 1989, headed “Interim orders” has effect as if it read as follows:

“(1) Where—

(a) a local authority makes an application for an interim care order or interim supervision order in relation to a child, and

- (b) one of the following applies in relation to the child—
 - (i) Article 11 of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children that was signed at The Hague on 19 October 1996 (measures of protection in cases of urgency) (“the Convention”),
 - (ii) Article 12 of the Convention (measures of a provisional character) ...

the court may make an interim care order or an interim supervision order with respect to the child concerned.

(2) A court shall not make an interim care order or interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2).

...

(4) An interim order made under or by virtue of this section shall have effect for such period as may be specified in the order, but shall in any event cease to have effect on whichever of the following events first occurs—

...

- (c) in a case which falls within subsection (1)(b)(i) or (ii), when—
 - (i) the authorities in another Contracting State with jurisdiction under the Convention have taken the measures required by the situation, or
 - (ii) measures taken by the authorities of another State are recognised in England and Wales....”

9. S.31(2) of the Children Act 1989 (referred to in s.38(2)), provides:

“A court may only make a care order or supervision order if it is satisfied

- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
- (b) that the harm, or likelihood of harm, is attributable to

- (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him;
 - (ii) the child's being beyond parental control."
10. Thus the scheme of the Convention, as implemented by the 2010 Regulations, is that, in respect of a child present in this country but habitually resident in another country that is a signatory to the Convention,
 - (1) the court of the other country has primary jurisdiction to take child protection measures in respect of the children under Article 5;
 - (2) the English family court has the power to take urgent measures under Article 11 or provisional measures under Article 12 in respect of the children, which may take the form of interim care orders under s.38 of the Children Act 1989 modified by regulation 5 of the 2010 Regulations;
 - (3) those urgent or provisional measures shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation;
 - (4) if the English court considers that it is better placed to assess the child's best interests, it may submit a request under Article 9 that it be authorised to exercise jurisdiction to take the measures of protection which it considers to be necessary.

Background

11. The mother and the father are British citizens, who met in 2009, were married in 2014 and have two children together: Y, born in 2014, and E, born in 2019. The mother has an older daughter, A, who is now 18 years old and lives in Spain where the mother's family had owned a home for many years.
12. The mother, father and their two children lived in this country, but during the COVID-19 pandemic decided to move to Spain. The mother and the children moved there in August 2021. The father remained in England for work reasons but visited Spain frequently to see the family. The mother and the children have been given five-year Spanish visas as a preliminary stage before applying for permanent residence. The children completed a year of school and nursery in Spain respectively.
13. In the summer of 2022, the mother and children came back to England for a short holiday. They were in the process of selling the family home here, but had not yet done so and therefore stayed at the property during the visit.
14. On 9 July 2022, E, then aged 3 years 3 months, was taken to the local hospital in England by the parents. She had sustained a deep penetrating stab wound to her back caused by a kitchen knife. E needed urgent surgery, without which the injury may have been fatal. Fortunately, she has made a good recovery. In conversation with the doctor, E said that her "father had done it".
15. The parents were interviewed by the police. We have not been provided with transcripts of their interviews. It is agreed, however, that neither parent gave a comprehensive

account of how the injury had occurred. Both accepted that they had been in the kitchen when E was stabbed. Neither could explain what had happened. Both described it as an “accident”. Both stated that they had been in the middle of a domestic argument at the time. They agreed that a row had started when the father brought Y home after playing football and the mother was angry about the boy being sunburnt.

16. Following this incident, Y and, when she was released from hospital, E were placed in the care of other members of the family, initially their maternal grandparents and subsequently their maternal uncle.
17. On 22 September 2022, the local authority started care proceedings under s.31 of the Children Act 1989 and the children were made subject to interim care orders under s.38. The parents, however, disputed that the English court had jurisdiction on the basis that the children were habitually resident in Spain. At a case management hearing on 18 October, HHJ Williscroft concluded that the children were habitually resident in Spain but that the court should “liaise with the Spanish court to decide if the case should be transferred to the English courts under article 9 of the Hague Convention 1996”. In the interim, she continued the interim care orders under Article 11, directed the parties to “provide an agreed draft summary to the court for use in the exchange of views under Article 9”, listed a review hearing in December and ordered that the “matter is stayed pending an exchange of views with the Spanish authorities.”
18. A week later, however, the judge informed the parties that she wished the issue of habitual residence to be reconsidered at a further hearing because her attention had not been drawn to the decision of MacDonald J in *London Borough of Hackney v P* [2022] EWHC 1981 (Fam). MacDonald J had found that the relevant date for determining habitual residence was the date of the hearing, whereas HHJ Williscroft had proceeded on the basis that the relevant date for determining habitual residence was the date the Court was seised of the matter. The issue of jurisdiction was then re-listed before Lieven J on 18 November. At the conclusion of the hearing, she reserved judgment but made an order which included a recital that

“if the court determines that the children’s habitual residence is Spain but considers that a request should be made to Spain in accordance with Articles 8 and 9 of the 1996 Hague Convention, it was appropriate to proceed to a finding of fact hearing as a matter of urgency without awaiting the determination of any Article 9 request in accordance with Article 11 of the Convention.”

The order listed the matter for a fact-finding hearing on the first available date after 1 March 2023, gave the parties permission to jointly instruct Dr Daniel Haines, forensic physician, to provide an expert report in respect of mechanism and force in relation to E’s injury, and gave various case management directions.

19. Meanwhile, the mother had filed a notice of appeal against the making of the interim care orders. On 11 November, Moylan LJ refused permission to appeal.
20. On 19 December, Lieven J gave judgment, concluding that the relevant date was the date the court was seised of the matter and that the judge had correctly decided that the

children's habitual residence was Spain. She also endorsed the decision to submit a request under Article 9, saying (at paragraph 35 of her judgment):

“... the parties agree that the English Court is in a better position to determine the facts of the present case, in particular what happened to E on the evening of 9 July 2022. I agree that is clearly the case. The incident took place in England, all the witnesses, both of fact and the medical witnesses, are present in the UK and all speak English rather than Spanish. Therefore, it is appropriate that a request under Article 9 be made and in the interim this case is case managed towards a fact finding hearing in the Derby Family Court.”

21. Meanwhile, the police had instructed a forensic scientist, Mr Nicholas Smith, to carry out an examination of clothing and other items in the room when the incident on 9 July had occurred. In December, he produced a report. His examination of a dress that E had been wearing disclosed five cuts, all in close proximity to each other but not all at the same angle of orientation. There was one larger cut measuring 2.5 cm in length orientated diagonally across the fabric with four further areas of damage at a different angle measuring 0.5 to 1 cm in length. Mr Smith commented:

“In my opinion, given the positioning and sizes of the damage features observed to each other, they cannot have been caused by the same single action. The larger damage feature is as I would expect given the stab injury that I understand the wearer sustained and is fitting with the fabric having been penetrated by a sharp relatively broad blade. However, the lower four, smaller damage features are as I might expect if the fabric had been penetrated by the tip of a sharp item and potentially through a fold in the fabric.”

Mr Smith also examined a booster seat in which E was said to have been sitting. He concluded:

“given the appearance of the large, solid central strut to the rear of the chair, and the location of the booster seat as it is attached to this chair it would seem highly unlikely that the damage to the clothing and hence the injury to E could have been caused whilst/if seated correctly in this booster seat.”

He also noted “a small area of recent cut damage is present to the rear left leg of the dining chair”.

22. On 11 January 2023, a medical report was filed from Dr Haines. He reported that the knife had entered E's abdominal cavity from the back just below the left kidney, passed through the back and front walls of the large intestine, and in addition caused two small cuts to the small intestine. The cutting of the colon allowed the passage of faeces into the abdominal cavity. Dr Haines reported that if either the left kidney or the local large blood vessels had been cut, severe bleeding could have followed and caused rapid death.

23. On 2 February 2023, the parents were arrested on suspicion of attempted murder and interviewed again.
24. We were told that the summary that the court had directed the parties to file was sent to the court in October 2022. However, despite Judge Williscroft's clear direction, endorsed by Lieven J, it seems that no request was ever made by the court to the Spanish court under Article 9 that the English court be authorised to exercise jurisdiction.
25. The fact-finding hearing was listed for 30 and 31 March 2023. On the first day, Dr Haines and Mr Smith were due to give evidence by video link. Following negotiations on the first morning, the parents made the following concessions, which were accepted by the local authority and the children's guardian:

“The parents accept that they were having a heated verbal argument in front of the children. They accept that during the course of that argument E suffered a very serious and life-threatening penetrating injury caused by a knife such that E required immediate surgical intervention.

The parents are not able to say how and when the injury occurred but accept:-

- a) That had they not been careless E would not have been injured.
- b) They are responsible for the fact of the injury regardless of precisely how it occurred.
- c) Neither prevented their child from suffering such a serious injury whilst in their care.
- d) This was not a deliberately inflicted injury, it was negligent and careless.

The parents sought immediate medical attention for E; had they not done so, E's life would have been at risk.”

26. Following those concessions, the fact-finding hearing did not go ahead. A case management order made on 31 March recorded the concessions, and that they had been approved by the court. The judge decided that a risk assessment should be carried out, made directions for it to be conducted by an independent social worker, Ms Jane Andrews, and listed the matter for a further hearing after her report was filed. Meanwhile, the interim care orders continued. The parties agreed that the parents' contact with the children should be up to fourteen hours a day supervised by the children's uncle.
27. On 2 May, Ms Andrews completed a risk assessment which she supplemented on 13 May with answers to questions posed by the local authority. On the basis of her interviews with the parents and her observation of a contact session, she concluded that the mother was the dominant parent and that this was likely to undermine the father. She advised that restorative work was needed “to help the couple better understand their relationship and how they interact”. Although the couple had engaged with Relate, Ms Andrews suggested an investigation into more direct therapy. She advised that the

mother's wish to return to Spain during the summer was "too soon and not realistic", in part because it would limit "some of the safeguards the family need, as extended family will not be as available to monitor or step in to help if issues arise".

28. With regard to the incident on 9 July, Ms Andrews made these observations:

"[i]n terms of the incident, they still feel unable to explain how the injury occurred. Seeing the environment and understanding that the entry point for the injury was behind E who was sitting in a booster seat on a dining chair, I am somewhat confused as to how this happened. Listening to the parents I can appreciate they were so 'in the moment' that they are unable to recall all events, but looking at the police transcripts its evident that they attempted to correct or answer what they say they cannot explain.Whilst I appreciate this is their position, I would expect them to be able to offer more detail. If they were so engrossed that they missed significant issues, then this might reoccur, so their commitment to further work to address their relationship is essential".

29. Ms Andrews made these final observations as to the risk of future harm (at paragraphs 6.2 – 6.3):

"I am assured the couple appreciate the risks this poses and would do their best to avoid similar arguments. Thus, while not totally mitigated there is evidence that the parents are working to address the risks, their respective needs, and pressure points within their relationship. They have accepted the concessions and, equally as important, continue to accept responsibility in terms of not having had the children's needs in mind whilst arguing..... the couple relationship has pressure points, which have crept into their behaviour patterns. Therefore, there will always be a risk that a similar argument could occur but as best as they can, the couple have confirmed their commitment to avoiding such disputes in front of the children, so I reinforce the need for them to continue to engage with therapeutic support."

30. It was Ms Andrews' conclusion, however, that there should be a "fairly swift" reunification of the family. In her answers to questions from the local authority, Ms Andrews confirmed that it was her view that the risks she had identified were not sufficient to prevent the reunification of the children with their parents. She described the risk of a similar event occurring as "extremely low".

31. After a case management hearing on 15 May 2023, recitals to a case management order made by the judge recorded the following:

"3. AND UPON the Court not being satisfied the Interim Care Order could be discharged until it is established that Relate and/or an identified therapist is in place to undertake the parental work as recommended by Jane Andrews but expressing the view that in the

event that this is in place then the court endorses the Guardian's position that the children should return home for the May half term.

4. AND UPON the Court indicating the parents and local authority should turn their minds to agreeing a working agreement, which can be in place when the children are in the unsupervised care of their parents.”

A hearing was listed for an hour on 24 May to consider whether a final order would be made in order to end the proceedings.

32. The day before the hearing, the parents had an introductory meeting with a therapist. A further session was fixed for 5 June.
33. At the hearing on 24 May, the local authority invited the court to continue the proceedings and the interim care orders, on the basis that they were not satisfied that it was safe for the children to be returned to the parents immediately. The parents asked for the order to be discharged and the proceedings brought to an end so that the children could return to their care as soon as possible. That could not happen immediately because of continuing bail conditions. But the parents indicated that they intended to apply for those conditions to be lifted as soon as possible. At that stage, the guardian supported a speedy transition, on the basis that therapy was now in place.
34. In the course of the hearing, the local authority referred to information from Spain about proceedings that had taken place in which the mother's eldest child, A, had alleged that she had been physically abused by the mother. The proceedings had apparently been dismissed by the Spanish court in the summer of 2022 but the local authority argued that the allegations were relevant to the evaluation of the risk to the younger children and had not been considered by Ms Andrews. It seems that the local authority had known about this information for several months and it is unclear why it was not identified as an issue to be considered by Ms Andrews when she was first instructed.
35. In her judgment, the judge at paragraph 3 summarised what had happened at the fact-finding hearing in these terms:

“They accepted negligent parenting in a threshold document which I and social services were prepared to accept. Like others I find it hard to accept neither has a physical memory of this, but I was clear the court process was unlikely to provide more clarity.”
36. She made a number of observations about Ms Andrews' assessment, including the following:

“14. The expert recommends some obvious steps to reduce risk including a clear agreement in writing setting out who will do what checks to make sure all is going well and the ongoing supportive role of wider family. Given home is where this event took place the children's feelings about this, when they haven't been there for a long time, need to be discussed and supported. More importantly, a clear narrative about what took place and whose responsibility it was, has to

be shared with the children and the whole family - an agreed narrative. The expert also suggested considering ways in which the children could explain either did not feel safe. To my mind the involvement of the wider family while in the UK is a key part of this. A plan needed to be formulated that considered how this would take place, and ongoing meetings. This needs to consider also what they could offer in the long run in Spain.

15. The expert did not have the information social services have only just provided about the eldest child in Spain and difficulties there. They suggest this is relevant to risk but while I am sure it is relevant to relationship based work, I consider it is unfair to bring in this information after the agreed expert instruction was sent and received and to try to rely on it to suggest greater risk and lack of open working, and I do not take it into account in more terms than an issue I have been aware of since the start.

16. It was the local authority's view the experts work was superficial and flawed. I do not share that view but I consider it could have been clearer in the language used. I thought it was notable social services were anxious about the "huge undertaking" she had thought would be sorting out an agreed narrative for all but in fact at court and later professionals and parents were able to sort this out. In the same way I am confident social work with children and parents can look at the children's feelings about returning home and support them very quickly and I do not accept that social workers should have done this already since it likely would only cause uncertainty.

17. The biggest issue is the parents' relationship. The expert did not think a return to Spain this summer was a good idea. I agree. It is very early days in them beginning to negotiate a different relationship and I consider this is a bigger task than they may expect. If one or both is charged with criminal offences this will inevitably cause stress. It must not result in a repeat of the row they had and its consequences. I agree with the expert something more than traditional relationship work is needed to change the axis of their relationship and it may be such challenge in fact these challenges whether it continues. This is difficult, painful work for them both. Her observations of the mother's dominance in decision making and the father's acquiescence was notable and her assessment that they "will do their utmost to avoid arguing", about which she was more confident a statement of intent only. I did not think the possibility of either or both being imprisoned was a reason to prevent reunification taking place as soon as therapy is available and an agreed protective plan in place.

18. Her final analysis was risk of a similar incident was extremely low but the power balance means ongoing risks. This she advised best explored in a therapeutic environment. She suggested in paragraph 3.5 of her addendum that more in-depth and challenging work would assist and should be commenced prior to any return of the children to the couple's care. I accept she meant what she said and could not put any

other interpretation upon it, but that more challenging therapy should be available and begun.”

37. The judge then expressed her conclusion in these terms:

“19. Here the risk from the event that took place was as high as it can be. The risk of that life threatening event being repeated I consider low. It relates to parents’ management of their own relationship and greater understanding of that but even were they to row no one who has observed them with their children considers they would deliberately harm them or did on this occasion. The guardian describes the conclusions of the expert report as “perhaps not overt” but concludes “the risks are manageable” in the guardian’s professional opinion and “there is no justification for the continued separation of the children from their parents “and as in any case to be balanced against the real risks of separation for children who would self-evidently want to live as a family in their own home from all the observations of them.” I accept that advice.

20. The balance of harm and risk caused by separation is something I consider social services while understandably anxious are not considering enough in the overall balance. I have considered the social work statement and position statement as well as the updating evidence provided since I began to draft a judgment. I am sympathetic to the anxieties social workers have but they accept the larger picture is a trustworthy family support system and loving care. I consider their own analysis does not fully reflect what to my mind is self-evident which is the children will very much miss their own home and parents care all the time. Understandably social services have had a hands-off approach in their care to date, reflecting the safe care they are receiving. For smaller children weeks feel like months to an adult. Being separated and away from your own home is something I must weigh very heavily in the balance.

21. I have heard from parents today that they swiftly established Relate which they will continue with will not provide the therapeutic challenges they require and they had last night a first meeting with a therapist whose CV shows he is well equipped to provide what they need. While I am sure it was an introduction, he already had the reports of the expert and mother’s lawyer reported the meeting was challenging. I am satisfied I can accept this is the beginning of a therapeutic process which the expert required and have been told of the further booked sessions.

22. Parents hope for the children to be home as soon as possible. It is half term next week so Y is not at school but E’s child minder still available. The uncle plans to take a holiday himself from 4th June so this would mean at least a short-change for the children should the current plans remain. I do think ideally this would take place while at school but I do not consider it is necessary since I already assess the risk that exists as manageable and consider the family involvement

already agreed which is extensive is suitable.

23. A risk exists I accept that if proceedings end in this court and are not proceeded with in the criminal courts, I cannot ensure parents will complete this therapeutic work they have begun before any return to Spain. The level of support available there and the stresses there may be there are currently unknown. Overall however, I consider they are devoted to being parents to their children and I would not foresee them abandoning therapy, which I consider both will find helpful as well as challenging for their own plans to take precedence.

24. I consider the risks manageable if the therapy and family support are in place along with an agreed narrative and oversight which will be considerable from social services family and other agencies. I consider how very difficult it must be for the children not to be living in their own home with their parents and in the end, they are the ones that have been most affected by their parents' negligent care.

25. I therefore discharge the interim care order as I consider it is not an urgent and necessary order now to keep these children safe. This brings the proceedings to an end.”

38. At the conclusion of the hearing, the judge approved an order which included, under paragraph 1, an order that the interim care order made on 22 September 2022 in respect of both children be discharged and, under paragraph 8 that “the proceedings are hereby concluded with the discharge of the interim care order made pursuant to Article 11 Hague Convention.”
39. On 26 May, the local authority filed a notice of appeal against the discharge of the interim care orders. On 1 June, I granted permission to appeal and made an order staying paragraphs 1 and 8 of the order. As a result, the children remain living with their uncle.
40. Meanwhile the parents had applied to the magistrates to vary the bail conditions. I directed that a copy of the order made granting permission to appeal be disclosed to the magistrates considering this application. On 2 June, the bail conditions were varied to enable the parents to have contact with the children either with the consent of the local authority or by order of the family court.
41. As noted above, at the hearing before the judge, the guardian had supported the discharge of the orders and termination of the proceedings. On 14 June, however, a skeleton argument was filed by leading and junior counsel on his behalf supporting the appeal “on two broad bases”. On 19 June, a respondent’s notice was filed on his behalf seeking permission to appeal against the order on two different grounds to those advanced by the local authority. A direction was given that we would consider that application at the appeal hearing.

The appeal – grounds and submissions

42. The local authority put forward three grounds of appeal, contending that the judge

- (1) failed to give proper and sufficient weight to the risks identified by Ms Andrews that such an incident as had befallen E could recur in the unsupervised care of the parents;
 - (2) gave undue weight to the parents' engagement with the therapist, the first meeting only having taken place the day before the hearing;
 - (3) failed to give proper and sufficient weight to the outstanding charging decision awaited from the Crown Prosecution Service.
43. On behalf of the local authority, Mr Nuvoloni KC and Ms Edwards relied on the fact that neither parent has been able to provide a cogent explanation as to how the injury was inflicted. The parents' evidence demonstrated that they can become so engrossed in a domestic argument or, to adopt a phrase they had used, 'in the moment' that the risks to the children elevated to a point at which neither parent had been able to protect E from near fatal injuries. As such, the risks to the children became heightened around the parents' ability to manage conflict, their relationship with one another, stresses and trigger points. It was submitted that, although the judge had identified the risks, she failed to analyse them properly, in particular the risk of unintentional harm. Mr Nuvoloni cited the observations of Lord Nicholls of Birkenhead in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at page 585 that
- “if the case is based on the likelihood of future harm, the court does not have to be satisfied that such harm is more likely than not to happen. It is enough that there is a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case....Predictions about future facts need only be based upon a degree of likelihood that they will happen which is sufficient to justify preventive action. This will depend upon the nature and gravity of the harm: a lesser degree of likelihood that the child will be killed will justify immediate preventive action than the degree of likelihood that the child will not be sent to school.”
44. The local authority invited this Court to allow the appeal, restore the interim care orders, and remit the case to the judge for further directions to consider how the progress of therapeutic intervention can be assessed and how risk can be managed in the light of that progress.
45. On behalf of the guardian, the two grounds advanced in the respondent's notice for which permission to appeal was sought were as follows.
- (1) There was a material procedural error in the framing of the decision taken on 25 May 2023 to discharge the interim care orders under Article 11 of the Hague Convention 1996 in that even by that date, some 10 months after the inception of the proceedings, no decision had been taken as to whether the English court or the Spanish courts or authorities should assume authority for making enduring welfare orders in relation to the children.
 - (2) The court erred by failing to consider whether the proceedings should continue with the making of interim care orders as provisional measures under Article 12 of the

Hague Convention as an alternative to their continuation as urgent measures under Article 11.

46. The “two broad bases” on which the guardian supported the appeal in the skeleton argument filed by Mr Bagchi KC and Ms Williams were as follows.
47. First, they informed the Court that, on further reflection since the hearing on 24 May 2023, the guardian had changed his opinion on the balance of risk, the merits of the early cessation of the proceedings, and the timing of the rehabilitation of the children to their parents. It was submitted that the decision of the learned judge to conclude the proceedings was premature and wrong. Mr Bagchi and Ms Williams adopted the submissions made on behalf of the local authority, adding that, against the background of the concerns and anomalies in the parents’ accounts of the incident on 9 July and the limited nature of the concessions accepted by the court, the risks to the children were augmented by the lack of information as to how E’s injuries were sustained.
48. Secondly, it was argued that the court fell or was led into error in the decisions taken on 24 May 2023 by the polarising nature of the binary procedural options presented to her: either to conclude the proceedings or to make further ‘urgent’ protective measures in the form of interim care orders. The essential difficulty with this was that, as distinct from conventional domestic care proceedings and the way in which the Convention is designed to operate, there was no opportunity for the court to make enduring welfare orders or to return the case to Spain for the authorities there to make their own long-term protective measures. The judge ought to have been presented with the further options of either (a) exercising her powers ultimately to make final welfare orders under the Children Act 1989 following an Article 9 process enabling the same or (b) being presented with the realistic possibility that the Spanish authorities would take like measures as envisaged by the temporary protective regimes contained in Article 11 and/or Article 12 of the Convention (or in the case of Article 12 a “decision” on the measures). Had the full range of options contemplated by the Convention been presented to her, the judge would have been likely to direct the proceedings to either a final hearing or a transfer back to Spain and not simply ended them at that point.
49. Mr Bagchi and Ms Williams submitted that the clear intention behind Articles 5, 8 and 9 of the Convention is that, following liaison between the relevant authorities, a decision is taken either for jurisdiction to remain with the state of habitual residence or by agreement to be assumed by the state where the child is present but not habitually resident. The scheme of the Convention is for this issue to be addressed and resolved one way or the other within a sensible timeframe. This is fortified by consideration of the ‘interim’ protective measures provided by Articles 11 and 12 which limit the operation of either ‘urgent’ or ‘provisional’ measures so that “they shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation” or, in the case of Article 12, “have taken a decision in respect of the measures of protection which may be required by the situation”. Here that did not happen because in the absence of an Article 9 request the Spanish authorities have apparently remained in ignorance of these proceedings. A proper engagement with the provisions of Article 9 would have resulted either in the English court being able to assume full jurisdiction with the agreement of the Spanish authorities or a decision that the Spanish authorities would exercise their own protective jurisdiction. Therefore, the English court exercising its emergency or provisional powers under the Convention would have been in a position either to make long term welfare orders under section 31

of the Children Act 1989 or to hand the case back to Spain with a view to that state taking its own protective measures. Mr Bagchi and Ms Williams submitted that, had the court been clothed with the powers to make enduring orders, it would readily have accepted that the conclusion of the proceedings on 24 May was premature and would have had little difficulty in extending the proceedings at least to a stage beyond the point at which the children would have been returned to their parents and been assessed as being settled in their care. Ultimately, it would have seriously considered the possibility of the making of a supervision order for 12 months to enable the local authority to have formal oversight of the children's care for that period.

50. Developing his proposed second ground of appeal, Mr Bagchi submitted that, by this point in the proceedings, the court should have been considering the request for interim care orders less as 'urgent' and 'necessary' measures as framed under Article 11 and more as 'provisional' measures as contemplated by Article 12. If the judge had considered the proposed continuation of the proceedings to permit the court to control the process of rehabilitation under interim care orders as being 'provisional' measures rather than ones demanded by the 'urgency' of the children's situation, some months following the commencement of the proceedings, the question she asked herself would have been a different one, the need for such measures not having to satisfy the requirement of being urgent but merely whether they were designed for the protection of the children. The inaptness of the Article 11 measures sought made it much more likely that the court would favour the option of ending the proceedings - the only other option - whereas the choice between an Article 12 provisional measure and ending the proceedings was much more nuanced.
51. On behalf of the mother, Ms Hannah Markham KC told this Court that her client had not pressed for the proceedings to come to an end. Her concern had been that her children should come home as soon as possible. Ms Markham submitted that it could not be said that the judge's decision was so beyond the range of her reasonable discretion as to be considered wrong. Ms Andrews had been instructed on the basis of the agreed concessions, accepted by the local authority and endorsed by the court. Ms Andrews acknowledged that there is always a risk of any number of things occurring and that, if the parents do not engage in work and are not able to recognise issues again the future, then a similar incident "might" recur. Overall, however, it was Ms Andrews' opinion that the risk of a similar incident reoccurring was "extremely low". The court was entitled to look holistically at the question of risk alongside that of necessity and balance of harm to the children. It was acknowledged that this is not a case where there is no risk but, within the context of what is known about good care of the children, it was proportionate to order that the children should return home.
52. Ms Markham submitted that the evidence about the ongoing therapy was one factor amongst a myriad of others which were rightly weighed up in reaching the decision. The judge also recognised that the criminal investigation would be a source of ongoing stress for the parents, and thus placed sufficient weight on the support system / quality of care provided by the parents in order to meet this potential "pressure point" as described by Ms Andrews. Ms Markham's submissions were adopted by Mr Patrick Bowe on behalf of the father. In short, it was the parents' case that, whilst the local authority clearly disagrees with the welfare analysis conducted by the judge, it was properly and proportionately conducted and the mitigating factors for identified risks were taken into account. She had a great deal of evidence on which she concluded that

it was neither necessary nor proportionate for the interim care orders to continue and this Court should not interfere with her decision which was based on her evaluation of the totality of the evidence.

Discussion

53. As my Lord Peter Jackson LJ observed during the hearing, there has been a series of missteps in this case. I would identify five in particular: (1) the failure of the court to submit a request to the Spanish authorities under Article 9; (2) the holding of a fact-finding hearing when the Article 9 process remained unresolved; (3) the compromise of the fact-finding hearing on the basis of the concessions offered by the parents; (4) the discharge of the interim care orders; and (5) the termination of the proceedings.
54. As Lieven J has found that the children are habitually resident in Spain, jurisdiction in respect of child protection matters lies with the courts of that country under Article 5 and the powers of the English court to make orders are confined to those provided by Articles 11 and 12. The plan devised and agreed by Judge Williscroft on 18 October 2022, and subsequently endorsed by Lieven J, was to submit a request to the Spanish authorities under Article 9 to authorise the English court to exercise jurisdiction. That plan has never been implemented. We did not conduct any detailed inquiry into how and why this omission occurred. Ms Markham told us that all parties were responsible. For whatever reason, no request has so far been made.
55. The consequence is that the powers of the English court remain limited to those available under Articles 11 and 12. The limits of those powers are underlined in the Explanatory Report on the Convention by Paul Lagarde (at paragraphs 68-9):
- “It might be said that a situation of urgency within the meaning of Article 11 is present where the situation, if remedial action were only sought through the normal channels of Articles 5 to 10, might bring about irreparable harm for the child. The situation of urgency therefore justifies a derogation from the normal rule and ought for this reason to be construed rather strictly. The jurisdiction provided in Article 11 is, as an exception to the principle on which the Convention is based, a jurisdiction which is concurrent with that of the authorities of the State of the child’s habitual residence. Its justification is precisely the existence of a case of urgency. If this jurisdiction had not been provided, the delays which would be caused by the obligation to bring a request before the authorities of the State of the child’s habitual residence might compromise the protection or the interests of the child. This concurrent jurisdiction will have occasion to be exercised, for example, if it is necessary to ensure the representation of a child who is away from his or her habitual residence and who must undergo an urgent surgical operation, or yet if it is necessary to make a rapid sale of perishable goods belonging to the child.”
56. At paragraph 74 of the Report, Lagarde makes the following observations about Article 12:

“This text arose from a proposal of the delegation of the United Kingdom accepted by the Special Commission and inspired by the concern for ensuring the protection of children present in a foreign country for a stay of limited duration (vacation, short periods of schooling, harvest, etc.). Without there being, strictly speaking, urgency, it might be desirable, it was said, to help the family receiving this child, which is perhaps a little overburdened, by placing the child for the duration of his or her stay in a shelter or in another family, but under the supervision of the local social authorities. If such a measure were to prove to be desirable, the authorities of the place where the child is present would be the best placed to take it. At the Diplomatic Session, the desirability of keeping this article was discussed, since certain delegations feared that it might be utilised by the authorities of the State where the child is present, in order to take measures characterised as being provisional, but which might touch on questions as important as the attribution of the custody of the child, which would thus have devolved in a separate fashion on the territory of this State. This fear was finally judged to be excessive because of the limitations set out in the text.”

57. These passages demonstrate that the exercise of these powers must be confined to the circumstances for which they are intended and not expanded to take wider measures, the jurisdiction for which lies properly with the State of the child’s habitual residence. In the context of cases of child protection, this means that the powers under Articles 11 and 12 are confined to making interim orders under s.38 of the Children Act as amended by regulation 5 of the 2010 Regulations and do not extend to making final orders under s.31 of that Act.
58. So far as I am aware, this point has not arisen for consideration under Article 11. But it has arisen in an analogous context. As alluded to above, prior to the departure of the UK from the European Union, the principal instrument determining jurisdiction in matters relating to children was Council Regulation (EC) 2201/2003, commonly referred to as Brussels IIA. The scheme of the regulation was similar to that under the Convention. The basic jurisdictional rule (under Article 8 of the regulation) was that jurisdiction rested with the Member State in which the child was habitually resident at the time the court was seised. The power for other member States to take urgent and provisional measures was provided by Article 20.

“1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.”

59. Prior to the implementation of the European Union (Withdrawal Agreement) Act 2020, regulation 5(1)(b) of the 2010 Regulations included Article 20 of Brussels IIA in addition to Articles 11 and 12 of the Convention and the amendment of s.38(1) of the 1989 Act effected by regulation 5(2)(a) also extended to Article 20. In *Re S (Care: Jurisdiction)* [2008] EWHC 3013 (Fam) [2009] 2 FLR 550 at paragraph 89, Charles J observed that

“Any interim measures relying on article 20 (or in other cases where a return to another country so that it will make the future decisions is necessary or contemplated) are by definition interim. What will be required, and properly regarded as interim, will be case and fact sensitive and will be informed by co-operation and liaison It will be unusual for this court under article 20 (or in other such cases) to embark on fact-finding hearings....”

60. We did not hear submissions on this issue, and it is unnecessary to come to a definitive view for the purposes of disposing of this appeal. It is my provisional view, however, that it will be equally unusual for an English court to embark on a fact-finding hearing under Article 11 of the Convention.

61. It was therefore wrong of the family court in this case to conduct a fact-finding hearing without some awareness of the actual or likely response of the Spanish authorities to the Article 9 request. I understand the concern about delay and therefore do not criticise the case management directions which listed the fact-finding hearing. But they were made in the expectation that the request under Article 9 would be accepted by the Spanish authorities when in fact it was never made.

62. The next misstep was the compromise of the fact-finding hearing on the basis of the concessions offered by the parents which did not address the gravamen of the case. I share the concerns expressed in paragraph 5.11-12 of Ms Andrews’ report. I have not of course heard the parents give evidence, but like her I am troubled by the absence of any useful detail whatever in their accounts.

63. There are a number of troubling questions which in my view plainly required exploration before any firm view could be reached as to the risk of future harm.

(1) In what circumstances did the parents come to have a heated argument in the presence of the children?

(2) Who was holding the knife? Why were they holding it? How was it being held?

(3) How did it come about that E was stabbed?

(4) What was the cause or causes of additional cuts in her clothing? What was the cause of the damage to the dining chair?

(5) Is it true that neither parent is able to recall the details of this incident? If it is true, what is the explanation for their inability to recall? If it is untrue, why are they concealing information?

64. In my view these questions needed to be addressed. The concessions offered by the parents did not form a sufficiently clear factual basis on which the court could properly

assess risk. The judge observed that, like others, she found it hard to accept neither parent had a physical memory of the incident, but she was “clear the court process was unlikely to provide more clarity.” It seems, however, that the judge did not take into account the possibility that a continuation of the court process could lead to a finding that one or both of the parents were deliberately withholding information about the incident and that such a finding would be relevant to the assessment of risk. Furthermore, the judge stated in her judgment that “a clear narrative about what took place and whose responsibility it was has to be shared with the children and the whole family – an agreed narrative.” Yet with the ending of the care proceedings without any court order, the responsibility for creating the “clear narrative about what took place” rested with the parents alone. In the light of the parents’ failure so far to provide any satisfactory explanation for what took place, there was no basis on which the court could have confidence that they would discharge that responsibility.

65. The fact that there had been allegations that the mother had abused her elder daughter in Spain was also potentially relevant to the issue of future risk. It is true that the local authority had known about the allegations from an early stage in the proceedings but failed to mention them in the instruction to the expert. We were also told that the allegations had been rejected by a court in Spain. Nevertheless, it was an error of the court to proceed on the basis that it was “unfair to bring in this information after the agreed expert instruction was sent and received and to try to rely on it to suggest greater risk”. In the highly unusual circumstances of this case, when so little was known about how E had sustained her injuries, it was obviously necessary for there to be full disclosure of the Spanish proceedings and for Ms Andrews to be informed about the allegations, so that she could consider what further steps, if any, should be taken about them to inform the risk assessment.
66. All these points considered so far do not address the specific issues arising on this appeal. But they do provide the context in which the judge came to take the final missteps – to discharge the interim care orders and bring the proceedings to an end.
67. In my judgment, even on the narrow basis on which the parties presented the case at the hearing on 24 May, the judge was wrong to discharge the interim care orders, having regard in particular to the risks identified by the independent social worker Ms Andrews and emphasised by the local authority which were extended by the troubling absence of information about how E’s injuries were caused. Far from the reducing the level of risk, the information vacuum increased it, as it was not possible for the court to form a view of where the danger lay and what might lead it to recur. In those circumstances, the fact that the parents had only just embarked upon therapy was an additional reason for not discharging the orders. Given that the extent of the risks was unknown for the reasons set out above, the parents’ progress in therapy was of particular importance in the management of those risks. At the date of the hearing, the parents had not engaged with therapy to any material degree. The fact that the police have yet to reach a charging decision, and the uncertainties about the reaction of the parents to that decision when it comes, are an additional factor, although for my part I would not consider this factor by itself to justify interfering with the judge’s decision. I accept that this Court must tread carefully before interfering in an evaluation conducted by the judge on the totality of the evidence. I recognise that she was presented with strong evidence that the children were suffering as a result of their continued separation from their parents. But for the reasons stated, I reached the conclusion that the judge’s decision to discharge

the interim care orders was wrong, even on the narrow basis on which the case was argued before her.

68. I have sympathy with the judge. Presented with the arguments put before her it was not altogether surprising that she reached the view that the course proposed by the parents should prevail, particularly as it was at that stage strongly supported by the guardian. The real fault here was that she was not presented with the options as she should have been.
69. I accept Mr Bagchi's submission that the judge was led into error by the way the case was presented on the basis of the binary options of concluding the proceedings or extending the "urgent" interim care orders. She ought to have been reminded of the scheme of the Convention and that, beyond the limited powers available to her under Article 11 (or Article 12), jurisdiction to make welfare decisions about these children remained with the Spanish authorities unless a request under Article 9 was granted. Had she been reminded of the scheme of the Convention, the limits of her powers, and that primary jurisdiction remained with Spain, it is likely that she would have taken a different course. In particular, she would have made inquiries to establish what had happened to the Article 9 request. In those circumstances, she would in all probability not have discharged the interim orders and in my view certainly not have brought the proceedings to an end.
70. It is an interesting question whether, when primary jurisdiction remains with the Spanish courts, interim care orders made by the English court at this stage should be classified as "provisional" under Article 12 rather than "urgent" under Article 11. That is something which can be considered, if necessary, when the matter is remitted. It does not, however, give rise to a ground of appeal against the judge's decision to discharge the interim care orders. She took that course because she decided that the children's welfare no longer required that they be separated from their parents. She would have reached the same decision if the orders had been made under Article 12. Thus, I concluded that the guardian should be given permission to appeal on ground one set out in the respondent's notice but not on ground two.
71. For the reasons set out above, I reached the conclusion that the appeal should be allowed on grounds one and two advanced by the local authority and on ground one advanced by the guardian. Paragraphs 1 and 8 of the order of 24 May 2023 were set aside with the result that the interim care order under Article 11 was restored and the care proceedings brought under s.31 of the Children Act 1989 remain stayed pursuant to the order of 18 October 2022.
72. We gave the following additional directions. First the case was remitted to Lieven J, as Family Division Liaison Judge for the Midlands Circuit, for an urgent case management hearing, and the parties were directed to apply immediately for a two-hour hearing before her on the first open date after 17 July 2023. Secondly, we recorded that that hearing should be an occasion for the court to give case management directions or (if it considers it appropriate) to make substantive orders in relation to these issues:
 - (1) the continuation of the interim care order and separation of the children;
 - (2) interim contact arrangements;
 - (3) the progression of the Article 9 request;
 - (4) whether any interim powers should be exercised under Article 11 or Article 12;

- (5) whether a valid risk assessment can be conducted following the outcome of the finding of fact hearing in March 2023; and
- (6) whether, in the light of his change of position, the children's guardian should continue to act.

Thirdly, we directed that by 4pm on 30 June 2023 the local authority should update the parties as to enquires made as to the progress of any Article 9 request. Fourthly, we ordered that, if any applications were to be made for orders under s.34 of the Children Act 1989 in respect of contact, those shall be made by 4 July 2023 with a meeting being convened by no later than 30 June 2023 to discuss arrangements for the summer. Finally, we made a number of ancillary case management orders to ensure as far as possible that the judge was able to address the issues identified above at the hearing.

73. As stated at the end of the hearing when our decision was announced, and for the reasons spelt out above, I entertain considerable doubts about the compromise reached in March, but it will be a matter for the parties and the court, acting on proper principles, as to whether that decision can and should be revisited.
74. Those are my reasons for joining my Lords in allowing the appeal.

LORD JUSTICE NEWEY

75. I agree.

LORD JUSTICE PETER JACKSON

76. I also agree.