Neutral Citation Number: [2020] EWHC 1238 (Fam)

Case No: FD20P00072; FD20P00106; BR17F00367

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2020

Before:

MR JUSTICE MOSTYN

- -

Between:

AS	**Applicant**
- and -	
CPW	**Respondent**

- -
- -

Mehvish Chaudhry (instructed by **Miles & Partners**) for the **Applicant (father)**
Kate Claxton (instructed by **Morrison Spowart**) for the **Respondent (mother)**

Hearing dates: 11 & 12 May 2020
The hearing was entirely conducted remotely by Zoom

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MOSTYN

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

Mr Justice Mostyn:

1. I am concerned with three children:

   i) B, a boy born on 14 January 2006, now aged 14½;

   ii) AR, a boy born on 8 June 2010, now aged nearly 10; and

   iii) AS, a girl born on 27 September 2011, now aged 8¾.

2. On 6 February 2020 the father applied to the High Court in wardship for a summary inward return order in respect of B who was taken by the mother on 7 July 2019, 10 months ago, to her native country of Sierra Leone and left there with her family. The mother cross-applied on 20 February 2020 for an order permitting her retrospectively to relocate B to Sierra Leone until the summer of 2022 to enable him to conclude his GCSEs at a school in Freetown. In addition, I am asked to make child arrangements orders regulating contact between the father and all three children. That last application was commenced as long ago as 2017 in the Family Court at Bromley and has been ordered to be heard at High Court judge level alongside the wardship application.

3. There is no dispute that I have jurisdiction to deal with these applications. At the time that the private law proceedings were commenced in Bromley all three children were habitually resident here. At the time that the High Court proceedings were commenced by the father on 6 February 2020 B had become habitually resident in Sierra Leone. However, as his removal and retention were plainly wrongful, this court has jurisdiction over him pursuant to article 10 of Council Regulation (EC) No 2201/2003 of 27 November 2003. Moreover, by making her own application on 20 February 2020 the mother clearly accepted the jurisdiction of this court pursuant to article 12(3) of that regulation.

4. I will have something to say about the procedural aspects of this case later in this judgment.

5. The father is 37; the mother is 35. Both were born in Sierra Leone. They met in London in 2002 and began a relationship. They were married in 2005. As stated above, their children were born in 2006, 2010 and 2011. They separated in 2014. As mentioned, in 2017 private law proceedings were commenced by the mother seeking a child arrangements order and a non-molestation order. The mother alleged that the father had meted out to her domestic abuse and that therefore any contact should be supervised. The father refused to accept supervision of contact. A stand-off developed. As a result, the father has not seen any of the children for three years. A fact-finding hearing was ordered. This was held in November 2018. In a judgment dated 24 January 2019 District Judge Prevatt found the father guilty of domestic abuse, but not to the extent alleged by the mother.

6. Meanwhile, B was going off the rails. The evidence reveals the following events:

   i) On 11 February 2019 B ran away from home. The mother texted the father: "B has expressed his desire to want to live with you and that he no longer wants to live here. I would like to drop him off at yours, now." Given that the father had

not seen B for two years this reaction by the mother does signify a certain level of desperation.

ii) A few days later on 14 January 2019 the mother met the Head of Inclusion at B's school in an attempt to reduce the risk of permanent exclusion. At that meeting it was acknowledged that B had said he wished to move to another school. In the bundle there is a record of numerous instances of unpleasant disruptive conduct by B covering 6½ pages from September 2017 to February 2019. These had led to a three-day exclusion in May 2018 and a five-day exclusion from 1 February 2019.

iii) Notwithstanding these admonitions B's behaviour did not improve and on 10 June 2019 he was permanently excluded from his school. The consequence was that he would have to complete his education at what is known as a PRU school ("pupil referral unit") where children are placed who have been expelled from their schools or who have otherwise not been placed for mainstream education. Unsurprisingly the mother viewed this prospect with dismay and feared that B's education would be irretrievably impaired.

iv) In parallel with these events the mother gave evidence that B was getting involved in gang culture in his part of South London. In her first witness statement she stated:

> "As I explained to the Cafcass Officer, I was extremely worried about B's welfare as he had been permanently excluded from [redacted] School in July shortly before I went on holiday and this was the culmination of extremely disruptive behaviour and this is set out in the exclusion letter and refusal of appeal and behaviour report. I also know that B was a member of a gang and I had become extremely concerned for his life had he remained in London due to the high level of knife crime in South London which is gang related."

v) In her oral evidence she elaborated on this and explained how she had discovered that B had been on social media used by gang members and even been given a telephone by a local gang for the purposes of becoming a drug courier across county lines. It is true, as Ms Chaudhry submitted, that it was surprising that this was not mentioned in her written evidence. However, although I am satisfied that the mother is generally an unreliable narrator in writing I am satisfied, in this respect, that she held authentic and well-based fears for her son's welfare.

7. The mother therefore made the decision to take B to Sierra Leone to explore placing B there with her family (her mother is a police officer in that country) in order to continue his education in Freetown. Although B's British passport had been impounded in the private law proceedings in Bromley, she managed to obtain a passport for him from the Sierra Leonean High Commission. She booked return flights for herself to leave on 7 July 2019. There is some controversy as to whether she took the younger two children with her. A recital to an order made in Bromley on 20 December 2019, where the mother was represented by counsel, says that she did. Further, the father states that the younger two children were not at school in south

London when it reopened on 5 September 2019. However, the mother is emphatic that she did not take the younger two children with her and that they were placed for the entire summer holiday with her niece and nephew. It is unnecessary for me to decide this issue, other than to observe that if the mother is now correct then the recital that was agreed on her behalf is another example of her unreliable narration.

8. The mother sent an email to the father on 5 July 2019 announcing her intention to leave with B two days later. Although she sought his agreement she did not wait for his response and left anyway.

9. While she was in Sierra Leone, she reached the conclusion (if she had not already done so before her departure) that it would be best for B if he were to stay there and complete his education to GCSE level in that country.

10. This was, of course, completely unacceptable conduct and an extremely poor example of unilateral self-help. It was a wrongful abduction, of that there is no doubt.

11. The father hoped that the mother would be persuaded to return B to this country. He raised the mother's conduct in the private law proceedings which were listed for final hearing on 20 December 2019. On that day the order mentioned above was made. The father had only recently been awarded legal aid and sought an adjournment in order that he might be effectively represented, his newly instructed lawyers not having had sufficient time to prepare for the hearing. This was granted and an interim order was made which contained the following provisions:

    i) a recital recording the mother's agreement to return B to this country as soon as possible;

    ii) a prohibited steps order forbidding the mother from removing the two younger children from the jurisdiction without the consent of the father or the court; and

    iii) a fixture of the final hearing for 13 May 2020.

12. The mother did not comply with her agreement. B was not returned. The court was notified. In an email dated 21 January 2020 the court stated to the father:

> "Mother agreed she would return son. If she has not done so father will need to take action to get his son returned but as he is out of the country any such application will need to be made to the High Court."

I will explain later in this judgment why the opinion of the District Judge that only the High Court could make an inward return order is not correct.

13. As mentioned above, on 6 February 2020 these proceedings were commenced by the father. A case management order made on 28 February 2020 provided that a High Court Cafcass officer should interview B by telephone or video and prepare a report on his wishes and feelings and whether he should be granted party status. Ms Lynn Magson conducted a telephone interview with him on 19 March 2020 when he was brought to the British High Commission in Freetown. Additionally, on 24 March 2020

she participated as a mostly silent listener in a WhatsApp audio call between B and his father. She gave evidence about those calls in two written reports and in her oral evidence to the court, which was given by Zoom.

14. She recorded that B was a loquacious and effervescent young man. She judged that he spoke spontaneously and freely and not as a result of any scripting or other coercion from the mother or her family. She judged him to be chronologically mature. She did not feel that she was limited in her assessment of the expression of his wishes because her medium of communication was not face-to-face. She recorded a positive and natural interaction between B and his father. She recorded how B stated that he missed his mother and his siblings. Above all, however, she recorded an emphatic, categorical and repeated wish on the part of B to remain in Freetown until the summer of 2022 when he will have completed his GCSEs. She did not judge this wish to be foolish or irrational, but the product of reasonable consideration.

15. The applications before me will be judged by reference to the paramountcy of the child's welfare principle set out in section 1(1) of the Children Act 1989. In applying that principle, I must have regard to the matters set out in section 1(3). Of these the first mentioned is the wishes and feelings of B.

16. It was said to me by Ms Chaudhry, and also by Ms Magson, that at age 14½ B is of an age where his wishes "are entitled to be taken into account". I do not think that properly reflects the amount of weight that the court should place on not unreasonable wishes expressed by a child of this age.

17. It is noteworthy that in other spheres of family law, and indeed the general law, the decision of a child of 14½ will be decisive of the matter in question.

18. In the Victorian era the judges recognised a threshold of competence which they called the "age of discretion". This was set at 14 for a boy and 16 for a girl, although those ages were not written in marble. If a child who had attained the age of discretion ran away from the father the court would not compel the child's return by means of the writ of habeas corpus, notwithstanding that the father under the then law had sole parental authority. In uneasy contrast, however, where such a child was within the control of the father but wanted to spend time with the mother, the court would not override the father's veto: *In re Agar-Ellis (No 2)* (1883) 24 Ch D 317. That decision was effectively overruled by the Court of Appeal in *Hewer v Bryant* [1970] 1 QB 357 and was finally consigned to the history books by the decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. In the former case Lord Denning MR memorably stated, at 369:

> "… the legal right of a parent to the custody of a child … is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."

19. This dictum was approved by Lord Scarman in *Gillick,* where he said, at 186:

> "…that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and

> intelligence to be capable of making up his own mind on the matter requiring decision."

20. *Gillick* specifically decided that it was lawful for a doctor to give contraceptive advice and treatment to a child under 16 without her parents' consent where she herself could give consent. By then, as Baroness Hale pointed out in *Re D (A Child)* [2019] UKSC 42, [2019] 1 WLR 5403, at [23], it had already been established that a child below the age of 16 could consent to sexual intercourse so that it was not rape (*R v Howard* [1966] 1 WLR 13) or to being taken away so that it was not kidnapping (*R v D* [1984] AC 778).

21. However, the decision of a Gillick-competent child about a particular issue is not decisive if that issue is the subject of proceedings in wardship or under the Children Act 1989. Thus, for example, the court has the power to override, in his or her own best interests, the decision of such a child to refuse necessary medical treatment: see *In re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11 and *An NHS Trust v C NHS Trust & Ors* [2019] EWHC 3033 (Fam). A further example is that a Gillick-competent child can be made, contrary to his or her wishes, the subject of a secure accommodation order under section 25 of the Children Act 1989 and (probably) pursuant to the inherent power of the High Court also: *In re T (A Child) (Association of Lawyers for Children intervening)* [2019] 2 WLR 1173, CA; *Re D (A Child)* [2019] UKSC 42, [2019] 1 WLR 5403. In the latter case Lady Black said at [90]:

> "And nothing that I have said is intended to cast any doubt on the powers of the courts, recognised in the early cases to which I have referred, and still available today in both the parens patriae jurisdiction and under statute, notably the Children Act 1989, to make orders in the best interests of children up to the age of majority, with due regard to their wishes and those of their parents, but not dictated by them."

22. I would go further. In my judgment it is not merely a question of giving "due regard" to the wishes of a Gillick-competent child on a particular issue. In my judgment, if the decision of the House of Lords in *Gillick* is not to be hollowed out, the wishes of a Gillick-competent child on a particular issue, where they are not objectively foolish or unreasonable, should normally be given effect.

23. Neither my researches nor the researches of counsel have identified a case where the wish of a Gillick-competent child opposing an inward return order sought in inherent jurisdiction proceedings has been overridden. One case has been found where an outward return order pursuant to the inherent jurisdiction was made in respect of an opposing Gillick-competent child. That was *MR v JN (Re: Q & V (1980 Hague Convention and Inherent Jurisdiction Summary Return))* [2019] EWHC 490 where Williams J ordered the return to Poland of a 12-year-old child (V) pursuant to the 1980 Hague Convention and a 17-year-old child (Q) pursuant to the inherent jurisdiction. Both children objected to the return. Williams J set out his reasons for making the order in respect of the 17-year-old at [83]:

> "I have thought very long and hard about whether an order for return is in Q's best interests. I have concluded that it is in his

> best interest's overall to return but that still begs the question of whether an order is appropriate or not given his age. I have thought more than twice about what the right outcome and order should be in respect of Q. I have considered whether given his age I should decline the application for the order for return but rather to operate on the belief that he will return with V in any event as I believe that he wishes to remain with her and a large part of him wishes to return to Poland anyway. If I leave the choice to him I feel reasonably sure that he will come under significant pressure from his mother and her partner to remain and I do not consider that to be in his best interest. I conclude that there may be some merit in Miss Papazian's point that although he describes his contact with his father as being undertaken in order to comply with the court order that may in fact be a mask for an underlying and genuine desire to have a relationship with his father. I have also obviously considered whether in making an order for return it will set up struggle between the court system seeking to enforce the return and Q resisting. From all I have read and heard about Q I do not conclude that this is a likely outcome. I conclude that it is more likely that Q will cooperate in the process of return. In respect of Q I'm also satisfied that an order for his return should be made pursuant to the inherent jurisdiction. Notwithstanding he is 17 and has expressed a desire to remain in the UK and not to return to Poland, I'm satisfied on a summary assessment of his welfare that a return is in his best interests notwithstanding his age and his expressed views. The summary welfare assessment comprises many elements and save in respect of his expressed views they point to his welfare being promoted by a return to Poland and the resumption of a full life there. I am fully alive to the unusual nature of making a return order in respect of a 17-year-old who says he does not wish to return. However I am particularly alive to the issue of the impact that the chronic parental conflict is having on the ability of Q and V to truly understand their own positions and to be able to express views which are not tainted by the backdrop to their lives that the conflict has given. I consider that making an order in respect of Q may in fact free him from responsibility which would otherwise be placed on him to seek to remain in England in support of the mother's ongoing campaign to remedy what occurred in Poland in 2014."

I have to say that I am surprised by this decision, but it may be rationalised as being reflective of perceived equivocation on the part of Q as well as a concern that his expressed wish may well have been the product of coercion. Further, given that the 12-year-old was going anyway the decision of Q can easily be categorised as objectively unreasonable. I very much doubt that Williams J would have reached the same decision had he been concerned with the 17-year-old alone.

24. Two cases ordering the return of older children under the Hague Convention 1980 have been identified namely *AVH v SI & Anr (Abduction: Child's Objection)* [2015] 2 FLR 269 where a 14-year-old girl was ordered to be returned to Mexico notwithstanding her objections and *Y & Z (Children : Hague Convention)* [2017] EWFC 102 where the court ordered the return of 15- and 11-year-old siblings despite finding that they objected. However, each decision was made under a legal regime which does not make the child's interests the paramount consideration, and where the question of the child's objections is given its own separate and distinct treatment.

25. The father relies on the following facts and matters to justify overriding B's wish to stay in Freetown until the summer of 2022:

    i) it would reward a particularly blatant act of unilateral self-help by the mother;

    ii) it would perpetuate the separation of B from his parents, his brother and his sister;

    iii) it would leave him in a country riven by civil strife which is unstable and volatile;

    iv) his accommodation does not appear to be fixed and the members of the maternal family who care for him are not constant;

    v) his education would be within a school which is not in the top rank in that country; and

    vi) there is no national health system in Sierra Leone to care for him should he fall sick.

26. As an alternative to a summary order for an immediate inward return the father proposes that B should remain in Freetown and at his present school until the end of this summer term and that should return here for the summer holiday (assuming that flights have resumed) when his future should be decided between him and his parents and, if necessary, in the absence of agreement, by the court at that point. This the mother opposes. In order to avoid harmful delay, and to provide for closure now, she seeks a definitive decision, one way or the other.

27. I agree that the decision must be made now. I agree that the points made by the father have force although I do not accept that the quality of education being presently received by B in Freetown is unsatisfactory. I have noted the scope of the curriculum at his school and that it even includes learning Chinese. I do not have any serious concerns as to the quality of the accommodation, or the general care, being provided by the maternal family for B. I am not in a position to give any kind of definitive judgment as to the political situation in Sierra Leone.

28. I agree that being separated from his mother and his siblings is a disadvantage, but this is probably no worse than that experienced by many children who attend boarding schools. The mother's proposal is that not only should he return for holidays to this country but that, also, she and the two younger children should visit Freetown to see B and her family.

29. Notwithstanding the father's concerns I am not satisfied that B's wishes are objectively foolish or unreasonable. In my judgment it is in his best interests that they should not be overridden. Therefore, the father's application for a summary inward return order is dismissed and the mother's application to keep B in Sierra Leone until the summer of 2022 is granted.

30. In my judgment, there is no reason for B (or the two younger children) to be a ward of court. In his principal witness statement, the father argued that the status of wardship was needed in order to secure the continued impounding of the children's passports. This is not so. The Family Court unquestionably has the power to order the continuing impounding of the passports. He also argued that the status of wardship was needed to obtain the assistance of the British High Commission in Freetown. Again, this is not so. Ms Chaudhry argued that the status of wardship might help in any enforcement litigation that might have to be taken in Sierra Leone, but the impressive single joint expert on Sierra Leonean law, Ms Amy Betts-Priddy, did not agree: it would make no difference to any proceedings that might have to be taken in the court in Freetown.

31. In many of cases of this type wardship is sought almost as a reflex. I refer to FPR PD 12D para 1.3 which states:

> "The court's wardship jurisdiction is part of and not separate from the court's inherent jurisdiction. The distinguishing characteristics of wardship are that (a) custody of a child who is a ward is vested in the court; and (b) although day to day care and control of the ward is given to an individual or to a local authority, no important step can be taken in the child's life without the court's consent."

32. This needs to be borne in mind carefully by anybody seeking to make a child a ward of court in a case such as this. They need to ask: what does wardship add to the invocation of the inherent and/or statutory jurisdiction? The answer is, in many cases, nothing. I accept Ms Chaudhry's submission that in some non-Hague abduction cases (surely a minority) there are features where wardship may assist a return, but they would have to be clearly identified and justified by evidence, rather than by mere assertion.

33. In this case all three children will be de-warded.

34. This leads me to the private law proceedings which have been listed to be heard alongside the wardship proceedings. I understand why an order was made to that effect. It avoids a duplication of proceedings. However, it should not be thought that whenever the High Court's inherent powers are invoked existing private law proceedings in the Family Court should always be stopped and moved to be heard alongside the High Court proceedings. There will be cases, perhaps many cases, where the private law proceedings in the Family Court can continue perfectly satisfactorily notwithstanding that the High Court is supplying additional powers to those available in the Family Court.

35. There is now agreement about what the contact regime should be if B remains in Sierra Leone. B wishes to resume a full and meaningful relationship with his father.

This means that he and his father should be allowed to communicate freely by WhatsApp audio and video calls. The suggestion by the mother that these should be supervised is, frankly, absurd. It is the height of inconsistency for her to suggest, on the one hand, that B's should be afforded the autonomy to decide whether he should live and be educated but not be given, on the other hand, the autonomy to decide whether to communicate with his father without supervision.

36. In the event that B returns to this country for holidays (and I am not making any order to that effect but am leaving him to make his own decision) then the father should be permitted to have free contact with him during such holidays without any form of supervision. In her second witness statement the mother stated:

> "Should B does return (sic), I would like the father to state out exactly what he can do to support B. For fear of his safety in our neighbourhood, I would like B to live with his father provided of course he follows Cafcass recommendations as well as provide suitable accommodation."

The mother told me that this was no longer her position, but it does demonstrate, first, her great concern of the perils which B faces were he to live with her in her neighbourhood; and, second, her acceptance that the relationship between father and B requires no form of supervision.

37. There is also agreement about the contact the father will have with the younger two children. In a recital to the order of 28 February 2020 it was recorded:

> "…the mother agrees to supervised direct contact commencing once the father has started attending the domestic abuse perpetrator programme. The mother proposes that this contact should take place fortnightly at [redacted] Contact Centre".

The order went on to provide that the father must attend a domestic abuse perpetrator programme.

38. The mother's agreement to direct supervised contact has been expressed on at least three previous occasions stretching back to 2018.

39. However, by the time the case commenced before me the mother's stance had changed. She now said that she would only agree to direct supervised contact provided that the father had completed the programme and Cafcass agreed that contact should commence. She justified her change of position by reference to a report written by a Cafcass officer in the private law proceedings dated 24 March 2020 which stated:

> "Cafcass do not support interim arrangements pending completion of the DAPP as the risks have not been addressed and a safe exit strategy considered from the supervised arrangements."

40. Ms Chaudhry rightly referred me to paragraph 35 of FPR PD 12J which provides:

> "In the light of any findings of fact or admissions or where domestic abuse is otherwise established, the court should apply the individual matters in the welfare checklist with reference to the domestic abuse which has occurred, and any expert risk assessment obtained. In particular, the court should in every case consider any harm which the child and the parent with whom the child is living has suffered as a consequence of that domestic abuse, and any harm which the child and the parent with whom the child is living is at risk of suffering, if a child arrangements order is made. The court should make an order for contact only if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before during and after contact, and that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent."

Plainly, given the findings of fact that have been made, an order for contact can only be made which secures the physical and emotional safety of the children and the mother. An order for supervised contact provides such safety. Contact between the father and his children gives effect to the right to family life to all participants and facilitates one of the two most vital relationships in a child's life. However, unrestricted normal contact has to yield to safety measures where there have been findings of domestic abuse. That said, I just do not understand the logic underpinning the Cafcass officer's recommendation. Findings of domestic abuse would only in the rarest of cases mean no contact all; what they mean is that careful safety measures need to be implemented, perhaps for a prolonged period, while analysis is undertaken of the feasibility of moving to unrestricted contact. The mother plainly recognised this when, on legal advice, she made her agreement as recorded in the order of 28 February 2020.

41. The mother now has reverted to her earlier agreement. Therefore, there will now be supervised contact. The coronavirus pandemic means that all contact centres are presently shut. Perforce, the contact will have to be virtual, for the time being. I direct that it takes place by Zoom once each week for at least 40 minutes. Each session should be recorded. The mother will be at liberty to stop a session if the children are becoming distressed. The recording will reveal, if the mother does stop a session, whether she had justification to do so. This regime will continue until the contact centres reopen when direct supervised contact will take place fortnightly with each session lasting at least one hour. This will be in addition to the Zoom contact I have ordered. After four months of direct supervised contact, when at least eight sessions will have taken place, the matter is to be reviewed in the Family Court at Bromley to see how father's relationship with his children can be taken further forward. For this purpose, there will need to be an updating report from the Cafcass officer.

42. The mother is to be at liberty to take the two younger children to Sierra Leone for holidays to visit B and her family, for which purpose the passports presently impounded will be released to her. These holidays are subject to the following conditions:

    i) no such holiday may exceed 28 days in duration;

ii) at the conclusion of the holiday and the return to the United Kingdom the passports are to be returned to their present place of safety;

iii) the father must be given at least three weeks' notice of such each holiday with full details of the travel arrangements to, and accommodation in, Sierra Leone; and

iv) no such holiday can take place until this judgment, and the order giving effect to it, have been registered at the mother's expense in Sierra Leone pursuant to the Foreign Judgments (Reciprocal Enforcement) Act 1960 (Chapter 21 of the Laws of Sierra Leone).

I am satisfied, following the guidance in *Re R (A Child)* [2013] EWCA Civ 1115, [2014] 1 FLR 643 at [23], that this final condition, explained so clearly by the expert, is sufficient to neutralise the risk of any retention by the mother of the two younger children in Sierra Leone. I acknowledge the existence of such a risk. After all, in a report made in the private law proceedings on 23 January 2020 the Cafcass officer recorded that the mother had told her that she planned to relocate to Sierra Leone in April 2020 with the two younger children. However, the mother told me that this was not, and never had been, her true intention. I accept that, but am nonetheless satisfied that the mirroring in Sierra Leone of this judgment, and my order giving effect to it, is necessary in order to neutralise the risk.

43. The private law proceedings will now be transferred back to the Family Court at Bromley.

44. I now turn to certain procedural aspects of this case.

45. This is the second case in recent times where I have dealt with an application for an inward return order pursuant to the inherent powers of the High Court. My earlier decision is reported as *Re N (a child)* [2020] EWFC 35. In it, I sought to explain, following the Supreme Court decision of *Re NY (A Child)* [2019] UKSC 49, [2019] 3 WLR 962, that an application for a return order, whether outward or inward, should, save in exceptional circumstances, be formulated as an application for a specific issue order in the Family Court. At [9] I expressed the view that it was hard to envisage circumstances where it could be concluded that the Family Court did not have the necessary powers to make the substantive order sought. I therefore respectfully disagree with the view of the District Judge which I have set out at [11] above. The grant of a specific issue and prohibited steps orders is part of the routine diet of the Family Court. I have explained above at [10] how on 20 December 2020 the Family Court at Bromley made a prohibited steps order forbidding the mother from removing the two younger children from the jurisdiction. It would not have been much of a further step for the court to have gone on to have made an order requiring the mother to return B to the jurisdiction in circumstances where she was agreeing, at that time, to do so.

46. In this case the father sought the initial interim relief of a passport order. That particular tipstaff order can only be awarded by the High Court, and so I accept that the father was justified in approaching the High Court for that purpose. However, once it had been granted and executed, I see no reason why this case was retained in

the High Court rather than being sent to the Family Court where, of course, there were well-advanced existing private law proceedings.

47. Indeed, I cannot see, once the passport order had been executed, what was left to be decided in the High Court because everything else could have been decided within the existing private law proceedings at the Family Court in Bromley by a combination of specific issue and prohibited steps orders pursuant to section 8 of the Children Act 1989. I have already explained why I am extremely doubtful that the relief of wardship was aptly sought, but even if it had been actively pursued the wardship application could have been transferred to the Family Court in Bromley pursuant to FPR rule 12.36(2).

48. Accordingly, I repeat my view that where an inward or outward return order is sought, other than pursuant to the Hague Convention 1980, the application should seek a specific issue and/or a prohibited steps order and be issued in the Family Court. If it is considered that special expertise is required, a request for allocation within the Family Court to High Court judge level can be sought. If a tipstaff order is needed, then such an application must be made in the High Court, but it should be strictly confined to that specific relief.

49. I now turn to the question of separate representation for B. In the case management order of HHJ Moradifer dated 28 February 2020 the court ordered that:

> "The Cafcass High Court Team shall by 4pm on 27 March 2020 provide a report setting out Benjamin's wishes and feelings together with any views that Cafcass may have to whether Benjamin should be made a party and separately represented in these proceedings."

However, Ms Magson's first report dated 26 March 2020 did not address the question of separate representation.

50. Therefore, in the final case management order dated 8 April 2020 the court ordered:

> "The Cafcass Officer, Lynn Magson, shall by 4pm on 1 May 2020 file and serve a short report in order to update the court and parties in relation to the call between the father and B directed above and also the Cafcass Officer's recommendation in relation to whether B should be separately represented in these proceedings."

In her addendum report of 1 May 2020 Ms Magson stated:

> "Whilst being of the view B is of an age to have his views taken into account, I consider these are expressed within the previous report and re-enforced in his conversation with his father and available to the court and do not propose B should be separately represented."

51. I was surprised by this. Of course, had Ms Magson recommended that B should be separately represented, that would inevitably have caused an adjournment of the final

hearing listed only 11 days later. It would have been impossible to have appointed a Guardian, solicitors and counsel for B and for them to have read into the case in that short period. Even so, it is surprising, given the importance of the decision for B, a Gillick-competent child, that it was thought that the case could be conducted without his case being professionally and forensically put by representatives on his behalf. FPR PD 16A para 7.2(e) cites the situation where an older child is opposing a proposed course of action as one circumstance justifying the making of an award of party status to the child. It was this particular paragraph that Lord Wilson referred to in *Re LC (Children)* [2014] UKSC 1, [2014] 1 AC 1038 at [54] when cautioning against the routine grant of party status to older children objecting to an outward return order under the Hague Convention. However, it seems to me that where an older child is settled in another place, and strongly and consistently objects to a proposed inward return order under the inherent powers of the High Court, then that situation is markedly different. In my judgment, in an ideal world, B should have been awarded party status.

52. Finally, I refer to the four case management orders made by this court on 6 February 2020, 13 February 2020, 28 February 2020 and 8 April 2020. Each of these correctly has a penal notice prominently endorsed on the front page. The order cannot be enforced by committal unless the penal notice is thus displayed: see FPR rule 37.9(1). In *Re Dad* [2015] EWHC 2655 (Fam) Holman J stated:

> "Rule 37.9 exist for a purpose. The purpose clearly is so that somebody in the position of Mr Chaudhry can see prominently and at once, the moment a lengthy order of this kind is given to him, what the gravity of the situation is and that he is at risk not merely being arrested at the time, but of being committed to prison as a punishment for contempt of court."

53. Yet, notwithstanding the simplicity of the scheme of the rules numerous paragraphs of each order on subsequent pages have endorsed next to them: **"Penal notice attached"**. I have seen this in many other orders, and it is a seemingly ineradicable practice. What does it mean? Is this a different penal notice to the one on the front? Is it a reminder to the person served with the order in case they might already have forgotten what was on the front page? Is it therefore no more than a shorthand duplication? If so, why is it there?

54. I can see that something of this nature might be needed where a specific order of the court is needed to endorse a penal notice. That is the case for those orders made under the Children Act 1989 referred to in FPR rule 37.9(3). But these were not such orders. There was no reason at all for these words to be endorsed next to the paragraphs in question.

55. It is of the essence of any order that it should explain in clear English what the obligation of the person being served with the order is. The penal notice on the front could not be clearer. These additional words attached to certain paragraphs of the order only serve to confuse. They do not form part of the standard orders which are in force. In my judgment, it is time for this practice now to receive its quietus.

56. That is my judgment.
