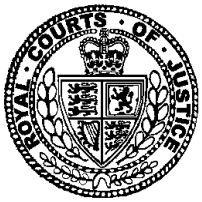

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Neutral Citation Number: [2022] EWHC 2127 (Fam)

Case No: NN21C00023

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2022

Before :

MRS JUSTICE LIEVEN

- -

Between :

A LOCAL AUTHORITY

Applicant

and

M

First Respondent

and

C and D (Children, by their Children's Guardian)

Second and Third Respondents

and

E

Fourth Respondent

- -
- -

Mr Nick Goodwin QC and Mr Stuart Yeung for the **Applicant**
Mr Martin Kingerley QC and Ms Samantha Dunn for the **First Respondent**
Mr Andrew Norton QC and Mr Christopher Adams for the **Second and Third Respondents**
Mr Aidan Vine QC and Mr Alex Forbes for the **Fourth Respondent**

Hearing dates: **6 June 2022**

- -

Approved Judgment

.....

MRS JUSTICE LIEVEN

This judgment is being handed down in private on 21 June 2022. It consists of 73 paragraphs. The judge does not give leave for it to be reported until it has been anonymised by counsel and approved by the judge.

Mrs Justice Lieven DBE :

1. This is an interlocutory judgment in care proceedings under Part IV of the Children Act 1989 ('CA'). The issue before me is whether criminal convictions for sexual abuse of a minor made by a Spanish court against the Mother's husband, ('E'), are admissible in these proceedings. E is not the father of the Mother's children.

2. The Local Authority was represented by Nick Goodwin QC and Stuart Yeung, the Mother was represented by Martin Kingerley QC and Samantha Dunn, the children were represented through their Children's Guardian by Andrew Norton QC and Christopher Adams, and the Mother's Husband was represented by Aidan Vine QC and Alex Forbes. I thank them all for their assistance.

3. On 21 February 2011 RB (now aged 57) was convicted at a Spanish Court of:

    (a) Sexual abuse of a minor on 18 August 2008, for which he was sentenced to 5 years' imprisonment;

    (b) Exhibitionism and sexual provocation with a minor on 18 August 2008, for which he was sentenced to 6 months' imprisonment.

4. According to the UK police statement, the offences occurred when E babysat an 11 year old girl, showed her pornographic images on his phone, touched her vagina and penetrated her with his finger. E was aged 44 at the time. He was released from Spanish custody on 13 February 2017.

5. The offences are recorded on a standard UK PNC report as:

    (a) Assault of a female child under 13, penetration of vagina/anus with part of body/object under s.6 Sexual Offences Act 2003 ('SOA');

    (b) Sexual assault under s.7 SOA;

    (c) Causing a child under 13 to watch a sexual act under s.12(1)(a) SOA.

6. The PNC report also records the imposition of an indefinite notification order, as a registered sex offender under the SOA, on E by the Magistrates in 2017, together with instances of subsequent non-compliance.

7. The offences are also recorded on a UKCA-ECR certificate. UKCA-ECR is the designated Central Authority for the UK in relation to the exchange of criminal conviction information, previously undertaken with other EU Member States under Council Decision 2009/315/JHA, managed by the ACRO Criminal Records Office.

8. The Local Authority, ('LA'), issued care proceedings on 19 February 2021 in respect of the Mother's two daughters. At present, neither child wishes to return to live with their mother whilst E remains in the house.

9. The Spanish convictions are central to the LA's threshold schedule. The consequent risks are of a different order to those relating to the Mother and children's other vulnerabilities and the historical domestic violence.

10. E does not contest the fact of the convictions, but he says that he was not guilty of the offences and he did not commit the acts alleged. He also argues that the trial process was unfair in a number of ways which make his convictions unsafe. These are set out in Mr Vine's and Mr Forbes' Position Statement as follows:

    1) He was represented by a lawyer whose primary business was conveyancing;

    2) The trial was concluded within a day (the complainant child gave evidence against him and he gave evidence in his defence);

    3) The complainant child's account was taken by two psychologists in one interview;

    4) The accredited verification process required for taking a child's account in this way by psychologists did not occur in this case;

    5) The complainant child spoke in English, with some Spanish, during her interview with the psychologists, but she was not a fluent Spanish speaker, and the psychologists did not speak English;

    6) The complainant child's mother and step-father were present throughout the psychologists' interview and they helped the child give her account;

    7) The complainant child gave two witness statements at the police station believed to be 24 hours apart. Her mother was present for the giving of one statement and also signed it. Her step-father was present for the giving of the second statement. The two statements gave very differing accounts;

    8) When the complainant child gave evidence to the court, her mother was in attendance with her to help her give her account.

11. A final hearing, with a time-estimate of 5 days, is listed before a District Judge in July 2022.

The law

12. Under FPR 2010 r.22.1 the court has wide powers to control the admissibility and use of evidence within family proceedings:

    "(1) The court may control the evidence by giving directions as to:

    (a) the issues on which it requires evidence

    (b) the nature of the evidence which it requires to decide those issues; and

    (c) the way in which the evidence is to be placed before the court

    (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.

……"

13. Under FPR 2010 r.22.2:

> *"(1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved –*
>
> *(a) at the final hearing, by their oral evidence; and*
>
> *(b) at any other hearing, by their evidence in writing.*
>
> *(2) The general rule does not apply –*
>
> *(a) to proceedings under Part 12 for secure accommodation orders, interim care orders or interim supervision orders; or*
>
> *(b) where an enactment, any of these rules, a practice direction or a court order provides to the contrary.*
>
> *……"*

14. Certificates of previous convictions are a form of hearsay evidence. Under the Civil Evidence Act 1995, hearsay evidence is admissible in civil proceedings. There is no dispute that the Spanish convictions are relevant evidence in the care proceedings.

15. The issue in this case arises from the rule in ***Hollington v Hewthorn*** [1943] KB 587, where it was held that a judgment in previous proceedings is not admissible in subsequent proceedings as evidence of the facts on which such a judgment was based. The facts of ***Hollington*** were that H had been convicted by the Magistrates of careless driving. In a subsequent civil action for negligence against the defendant driver the Court of Appeal ruled that the evidence of the conviction was inadmissible.

16. The decision has been described in many subsequent cases as being controversial and a number of exceptions to the rule have been carved out, either by statute or subsequent cases.

17. The rule has been abrogated by statute in respect of UK criminal convictions. The Civil Evidence At 1968 s.11 provides:

> *"Convictions as evidence in civil proceedings.*
>
> *(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or of a service offence (anywhere) shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.*

> *(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or of a service offence—*
>
> *(a) he shall be taken to have committed that offence unless the contrary is proved; and*
>
> *(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.*
>
> *(3) Nothing in this section shall prejudice the operation of section 13 of this Act or any other enactment whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.*
>
> *(4) Where in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (2) above, a copy of that document, or of the material part thereof, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or part unless the contrary is shown".*

18. An individual convicted by a UK court will therefore be taken, in subsequent family proceedings, to have committed the offence for which he was convicted unless the contrary is proved. The burden of proof will lie on that individual to establish to the civil standard that the conviction was erroneous – see *Re B (Minors) (Issue Estoppel)* [1997] 1 FLR 285, followed by McFarlane J (as he then was) in *Re B (Children Act Proceedings) (Issue Estoppel)* [2010] 1 FLR 1176.

19. The rule in *Hollington* was considered in detail by Leggatt J (as he then was) in *Rogers v Hoyle* [2013] EWHC 1409 which concerned the admissibility of an Air Accident Investigation Board ('AAIB') report in civil proceedings, or whether the rule in *Hollington* applied. At [84] – [90] he said:

> *"84. Hollington v Hewthorn has always been a controversial case. The actual decision – that a conviction by a criminal court is not admissible in civil proceedings as evidence that the offence was committed – has been reversed by statute: see s.11 of the Civil Evidence Act 1968 . That change in the law was made on the recommendation of the Law Reform Committee in its Fifteenth Report ("The Rule in Hollington v Hewthorn ", Cmnd 3391, 1967). In that report the Committee was scathing of both the decision and the reasoning in the case:*
>
> *"Rationalise it how one will, the decision in this case offends one's sense of justice. … It is not easy to escape the implication in the rule in Hollington v Hewthorn that, in the estimation of lawyers, a conviction by*

a criminal court is as likely to be wrong as right. It is not, of course, spelt out in those terms in the judgment of the Court of Appeal, although in so far as their decision was based mainly upon the ground that the opinion of the criminal court as to the defendant driver's guilt was as irrelevant as that of a bystander who witnessed the accident, the gap between the implicit and the explicit was a narrow one. It is in a sense true that a finding by any court that a person was culpable or not culpable of a particular criminal offence or civil wrong is an expression of opinion by the court. But it is of a different character from an expression of opinion by a private individual."

85. The Law Reform Committee went on to point out some of the material differences between an expression of opinion by a private individual and by a court, including the fact that courts are aided by a procedure designed to ensure that the material needed to enable them to form a correct opinion is available. The Committee continued:

"We approach the rule in Hollington v Hewthorn from the premise ... that any material which has probative value upon any question in issue in a civil action should be admissible in evidence unless there are good reasons for excluding it. Our further premise is that any decision of an English court upon an issue which it has a duty to determine is more likely than not to have been reached according to law and to be right rather than wrong. It may therefore constitute material of some probative value if the self-same issue arises in subsequent legal proceedings."

86. Despite these premises and its recommendation that the rule in Hollington v Hewthorn should be abolished in relation to criminal convictions, however, the Law Reform Committee did not recommend the abolition of the rule as regards findings made in earlier civil proceedings.

87. In so far as the rule in Hollington v Hewthorn continues to apply to such findings, it has attracted further criticism. In Hunter v Chief Constable of the West Midlands (sub nom McIlkenny v Chief Constable) [1980] QB 283 at 319, Lord Denning MR (who had been counsel for the unsuccessful appellant in Hollington v Hewthorn) said:

"Beyond doubt [Hollington v Hewthorn] was wrongly decided. It was done in ignorance of previous authorities. It was done per incuriam. If it were necessary to depart from it today, I would do so without hesitation."

On appeal to the House of Lords in the same case Lord Diplock (with whose speech the other members of the Appellate Committee agreed) echoed this view, saying that Hollington v Hewthorn "is generally considered to have been wrongly decided:" see Hunter v Chief Constable of the West Midlands [1982] 1 AC 529 , 543.

88. However, Hollington v Hewthorn has not been over-ruled and, since these comments were made, the pendulum seems to have swung back some way. In Three Rivers , as already mentioned, the rule in Hollington v Hewthorn was treated as settled law. In Secretary of State for Trade and

> *Industry v Bairstow [2004] Ch 1, the Court of Appeal held that, even if Hollington v Hewthorn could originally have been confined to cases where the earlier decision was that of a criminal court, it had stood for over 60 years for a much broader proposition and establishes that factual findings in earlier civil proceedings are not admissible as evidence of the facts so found. That decision was followed in Conlon v Simms [2008] 1 WLR 484 , where the Court of Appeal held that the rule in Hollington v Hewthorn applied to render inadmissible in later civil proceedings findings made by a solicitors' disciplinary tribunal.*
>
> *89. In Calyon v Michailaidis [2009] UKPC 34 reliance was placed in proceedings in Gibraltar on a judgment of a Greek Court which had found that the claimants were the lawful owners of an art collection. The defendant in the Gibraltar proceedings had not been a party to the Greek proceedings. The Gibraltar Court of Appeal nevertheless held that the Greek judgment was conclusive of the question of ownership. On appeal to the Privy Council the Board held, following Hollington v Hewthorn , that, far from being conclusive, the Greek judgment was not admissible as evidence at all.*
>
> *90. Thus, unless and until it is reconsidered by the Supreme Court, the rule in Hollington v Hewthorn must, except in so far as it has been reversed by statute, be taken to represent the law."*

20. On appeal the Court of Appeal [2014] EWCA Civ 1409 expressed a similar view as to the decision in ***Hollington*** at [35]:

> *"The rule, at any rate so far as it applies to criminal convictions, has been controversial for years. In McIlkenny v Chief Constable of West Midlands Police Force [1980] 2 All ER 227 at 237, [1980] QB 283 at 319 Lord Denning MR, who had been counsel for the appellant in Hollington v Hewthorn described it as '[b]eyond doubt ... wrongly decided'. In the House of Lords in the same case Lord Diplock said that that was generally considered to be so. In Arthur J S Hall & Co (a firm) v Simons, Barratt v Ansell (t/a Woolf Seddon (a firm)), Harris v Scholfield Roberts & Hill (a firm) [2000] 3 All ER 673 at 702, [2002] 1 AC 615 at 702 Lord Hoffmann said that the Court of Appeal in that case was 'generally thought to have taken the technicalities of the matter much too far'".*

21. The Courts have carved out a number of exceptions to the rule in ***Hollington***. Firstly, where the judgment or decision is considered to be the opinion of an expert or an expert tribunal, as was the position of the AAIB in ***Hoyle v Rogers***.

22. The second area of exception is where the subsequent proceedings are effectively parasitic or reliant upon the original judgment, and the facts to be determined are wholly or largely identical. Examples of this are ***Director of the Assets Recovery Agency v Virtosu*** [2008] EWHC 149 QB. The Moldovian defendant to an application by the Assets Recovery Agency under the Proceeds of Crime Act 2002 had been convicted by a French court of people trafficking. The Agency's director successfully argued that the Defendant's assets were property obtained through unlawful conduct in France, the judgment of the French court discharging the burden of proving, as required by

s.241(3)(a) of the 2002 Act, that the matters alleged to constitute unlawful conduct in France had in fact occurred. Tugendhat J referred to *Hollington v Hewthorn* and then stated:

> *"[40] The position in the present case is distinguishable. The form of the French judgment (unlike the English certificate contemplated by the court in Hollington v Hewthorn) enables the English court in the present case to link up the conduct the subject of the conviction with the conduct to be proved by the director in this case. And the issue is identical in both the French case and the present one.*
>
> *[41] Further, in Re a solicitor [1992] 2 All ER 335 at 342, [1993] QB 69 at 78–79 Lord Lane CJ giving the judgment of the Court of Appeal said:*
>
> *'[Counsel for the appellant] also placed reliance on [Hollington v Hewthorn]. That decision, he submits, precludes the tribunal from placing any reliance upon the opinion of the board as to the truth of the matters which it was the tribunal's duty to inquire into and determine.*
>
> *This submission, in our judgment, falls to the ground once it becomes clear that the tribunal is not bound by the strict rules of evidence, save for the effect of r 41 already referred to. The effect of [Hollington v Hewthorn] was removed by ss 11 and 13 of the Civil Evidence Act 1968 in cases to which those sections apply.*
>
> *It is perhaps of interest to note that in Hunter v Chief Constable of West Midlands Police [1981] 3 All ER 727 at 734–735, [1982] AC 529 at 543 Lord Diplock, with whose speech the other members of the House of Lords agreed, said of the decision of the Court of Appeal in that case:*
>
> *"Despite the eminence of those who constituted the members of the Court of Appeal that decided it (Lord Greene MR, Goddard and du Parcq LJJ) Hollington v Hewthorn is generally considered to have been wrongly decided, even in the context of running-down cases brought before the Law Reform (Contributory Negligence) Act 1945 was passed and contributory negligence ceased to be a complete defence; for that is what Hollington v Hewthorn was about. The judgment of the court delivered by Goddard LJ concentrates on the great variety of additional issues that would arise in a civil action for damages for negligent driving but which it would not have been necessary to decide in a prosecution for a traffic offence based on the same incident, and on the consequence that it would still be necessary to call in the civil action all the witnesses whose evidence had previously been given in a successful prosecution of the defendant, or a driver for whose tortious acts he was vicariously liable, for careless or dangerous driving, even if evidence of that conviction were admitted. So no question arose in Hollington v Hewthorn of raising in a civil action the identical question that had already been decided in a criminal court of competent jurisdiction, and the case does not purport to be an authority on that matter."*

> *We point out that in this case the tribunal was charged with determining the identical questions which had already been decided in Western Australia by the board which was a tribunal of competent jurisdiction"".*[emphasis added]

23. I will return to this passage below when considering the relevance of the two cases being on identical facts. However, it can be seen from this passage that Tugendhat J's analysis in part rests on the matters in the two proceedings being "identical", see [40], and Lord Diplock in ***Hunter*** relied on the fact that in ***Hollington*** the Court had referred to the need to consider different matters in the civil proceedings than would have been relevant for the Magistrates in the original conviction.

24. In ***Helene v Bailey*** [2022] EWCF 5, Peel J considered a submission that the judgment in the financial remedy proceedings was not admissible in the subsequent committal proceedings. Peel J at [17] said:

> *"In my judgment, the submission on behalf of H that the judgment in the financial remedy proceedings is not admissible in the subsequent committal proceedings before me is not well founded:*
>
> *i) It is, it has to be said, a startling notion that the very judgment which gives rise to the order from which springs a committal application cannot be admitted in evidence. How else is a court to make sense of the order which has been made?*
>
> *ii) Logically, on H's case, no judgment in a final hearing conducted according to the civil standard of proof can ever be referred to within subsequent committal proceedings. Thus, in a family context, a judge hearing a contempt application would not be permitted to take account of, or refer to, or in any way rely upon, findings made at a substantive trial of financial remedy, or public law, or private law proceedings, or indeed any other part of the family jurisdiction. Further, H's submission that "findings of fact by earlier tribunals are inadmissible in subsequent civil proceedings because they constitute opinion evidence" means that it would never be open to the court to be referred to the prior judgment upon a subsequent enforcement application of whatever nature. Moreover, following the logic through, a substantive judgment including findings as to, for example, periodical payments, could not be before the court upon a variation application under s31 of the Matrimonial Causes Act 1973 (as amended). All of this seems to me to be extremely doubtful.*
>
> *iii) Counsel for H were not able to point me to a single authority where a substantive judgment was ruled inadmissible in a subsequent committal application made in respect of the order springing from that very same judgment, whether in family proceedings or elsewhere in the civil jurisdiction. My personal experience (and I believe reflected in published judgments on committal in the Family Court or Family Division) is entirely to the contrary. The closest they came was brief obiter dicta by Sir James Munby P (who appears to have received no submissions by counsel on the point) in Re L (A child) [2016] EWCA Civ 173 where he said at paragraph 68:*

"I referred in paragraph 50 above, to what McFarlane LJ had said in Re K about the circumstances in which a judge who had conducted the kind of hearing which took place in the present case before Keehan J on 8 October 2015 ought not to conduct subsequent committal proceedings. That issue, which was at the heart of the appeal in Re K , is not one which, in the event, arose for determination here, so I say no more about it. The point to which I draw attention, is simply this. Quite apart from the Comet principle, which, as we have seen, would prevent the use in subsequent committal proceedings of the evidence given by someone in Mr Oddin's position at a hearing such as that which took place on 8 October 2015, it is possible that the rule in Hollington v F Hewthorn and Company Limited and another [1943] KB 587[15] might in certain circumstances prevent the use in subsequent proceedings of any findings made by the judge at the first hearing. That is a complicated matter which may require careful examination on some future occasion; so, beyond identifying the point, I say no more about it

I do not read those short sentences as authority for the proposition advanced on behalf of H.

iv) The rule can be encapsulated in one sentence. Goddard LJ said at 596-597 of Hollington v Hewthorn that "A judgment obtained by A against B ought not to be evidence against C". It concerns different parties to different proceedings. As HHJ Matthews said in Crypto (supra) it concerns admissibility "between different parties" . And Phipson (supra) describes the rule as applicable to issues between strangers, or between a party and a stranger.

v) So far as I can tell, and consistent with these propositions, the rule in Hollington v Hewthorn has been applied to exclude previous judgments only in cases of separate, distinct proceedings and/or involving different parties. Even then, as both Hoyle v Rogers and JSC BTA Bank v Ablyazov demonstrate, the earlier decision may be admitted (or, perhaps more accurately, not excluded) if fairness so requires. The decision in Hollington v Hewthorn itself prevented a criminal conviction for careless driving being admitted in civil proceedings brought by those injured in the collision. These were two, separate sets of proceedings, with different parties since.

vi) By contrast, the committal applications before me are part of the same set of proceedings, namely enforcement referable to the financial remedy claims, and they are between the same parties.

vii) I conclude that Hollington v Hewthorn is not authority for the proposition that the judgment in earlier proceedings between the same parties cannot be admitted in evidence for the purpose of a contempt application arising out of the earlier judgment, and order made thereon.

viii) The foundation of the rule is the fairness of the subsequent trial.

> *ix) Evidence presented in the earlier proceedings, and the contents of the judgment from the earlier proceedings, are, in my judgment, admissible in subsequent committal proceedings flowing from the earlier proceedings, and between the same parties.*
>
> *x) The weight to be attached to the earlier proceedings, and judgment, will be a matter for the judge conducting the committal proceedings.*
>
> *xi) None of the above derogates from long established principle that the applicant must prove the alleged contempt of court to the criminal standard."*

25. The third area of exception, although this one is less clear from the caselaw, is that of inquisitorial proceedings. In *Towuaghantse v General Medical Council* [2021] EWHC 681, Mostyn J determined the admissibility of a coroner's conclusions within a fitness to practise hearing conducted by the General Medical Council. Having noted that s.11 Civil Evidence Act 1968 abrogated the rule against the admissibility of criminal convictions in civil proceedings, Mostyn J queried the position in relation to other civil judgments and coronial verdicts. Having cited the rule in *Hollington v Hewthorn*, he determined that he did not need to decide whether the rule was correct and binding:

> *"30. The reason I do not have to grasp the nettle is that the rule has long been held not to apply to inquisitorial proceedings. For example, it does not apply to family proceedings, whether about children or money, where the court is obliged by statute to take into account all the circumstances of the case: see Re H (A Minor) (Adoption: Non-patrial) [1982] Fam 121, Richardson-Ruhan v Ruhan [2017] EWHC 2739 (Fam), [2018] 1 FCR 720 at [12] – [13]."*

26. The basis of this analysis was *Re H (A Minor) (Adoption: Non-Patrial)* (1982) Fam 121, in which he (as Nicholas Mostyn) appeared before Hollings J in proceedings relating to the adoption of a Pakistani child who had been refused a visa extension by the Secretary of State. An issue arose as to the admissibility and weight to be attached to the Secretary of State's decision. Hollings J ruled as follows:

> *"Before considering these submissions and their implications I must here interpose to refer to and consider a different but related submission which has been made by Mr Mostyn on behalf of the applicants. This was that I should take quite the opposite view and pay no regard at all to the decision of the Secretary of State and the adjudicator on the ground that it was a decision in proceedings between different parties, on the principle res inter alios acta alteri nocere non debet and relies upon the well-known decision in Hollington v Hewthorn & Co Ltd [1943] KB 587 as developed in Phipson on Evidence 12th ed (1976), paras 1379 to 1385.*
>
> *Adoption proceedings are however sui generis and are in substance, if not in form, non-adversarial in conception. The minor is represented by his guardian ad litem who is enjoined by the rules to make specific, detailed, inquiries and to file a confidential report. This report is rarely revealed, at least in its totality, to the applicants or others who may be making representations. The court relies upon the report of the guardian ad litem*

> *and on reports obtained by him. I have referred to the reports filed in the present case. Much of the evidence thereby presented to the court is hearsay. When welfare considerations apply, where the welfare of the minor is paramount as in guardianship or wardship cases, or a first consideration as in adoption proceedings, the very welfare of the minor dictates that regard must be had to every matter which bears upon a possible risk or benefit to the child and see the decision of the House of Lords in In Re K (Infants) [1965] AC 201 which concerned wardship proceedings. I can see no reason for making a distinction between reports supplied pursuant to the adoption order and reports originating in any other way, and plainly a decision after investigation by the Secretary of State carrying out his duties under the Immigration Act 1971 must be able to be received by this court and given due weight and consideration. Further by section 3 this court is enjoined to take into account all the circumstances of the case".*

27. The second authority referred to in *Towuaghantse v General Medical Council*, was *Richardson-Ruhan v Ruhan* [2017] EWHC 2739 (Fam), a decision of Mostyn J in financial remedy proceedings in which counsel relied on *Hollington v Hewthorn* in objecting to the admissibility of previous Commercial Court judgments. Mostyn J said:

> *"I therefore do not need to decide definitively whether the rule still survives (as Christopher Clarke LJ has held in an obiter dictum in Hoyle v Rogers & Anor [2014] EWCA Civ 257 at [39]), or whether it has been abrogated by the Civil Evidence Act 1995. In any event, the rule has been held not to apply to inquisitorial proceedings where the court is obliged by statute to take into account all the circumstances of the case (see Re H (A Minor) (Adoption: Non-patrial) [1982] Fam 121.*
>
> *Reference to other judgments involving the parties, or one of them, is commonplace in financial remedy proceedings, and indeed in civil proceedings generally. The fact-finder will, as with all hearsay material, give the judgments the weight that they deserve, always reminding him or herself that the decision is to be made by him or her alone".*

28. I am not wholly convinced by Hollings J's reasoning in *Re H* because the simple reason why *Hollington* did not apply to the decision of the Secretary of State was that it was an administrative decision and not a judicial one. Therefore, Mostyn J, in my view, went too far in *Richardson-Ruhan* in holding that *Hollington* has been held not to apply in inquisitorial proceedings. However, the broader point that inquisitorial jurisdictions may take a different approach to the admissibility of evidence, and thus the application of *Hollington*, is in my view a sound one. I will return to this point in my conclusions.

The Submissions

29. Mr Goodwin, supported by Mr Norton, submits that this Court is not bound by *Hollington* because it can be distinguished on the following grounds.

30. Firstly, that *Hollington* does not apply to proceedings under Part IV CA 1989. As Mostyn J said in *Towuaghantse*, such cases are inquisitorial and, as such, materially different from *Hollington* in terms of the rules of evidence. Care proceedings are not

simply inter partes proceedings, but have a distinct public interest, namely the protection of the child. Section 1 CA places a duty on the Court to have regard to interests of the child.

31. Mr Goodwin accepts that at the stage of determining case management decisions, the welfare interests of the child are not paramount. However, they remain material considerations and will generally carry a great deal of weight. He says that if the LA are required to prove the facts of a conviction when the events took place over 10 years ago in another country, the problems of rerunning a fact finding trial are obvious, would obstruct the course of justice, and be contrary to the statutory duty (subject to frequent departure) to complete cases within 26 weeks.

32. He submits that the proper approach is for the convictions to be admissible and for the convicted individual, if s/he so wishes, to seek to disprove them to the civil standard in the same way as would be the case for UK convictions. E may seek to disprove the convictions either by reference to evidence on the underlying facts or by reference to alleged breaches of natural justice in the trial process.

33. In support of these submissions Mr Goodwin points out that in many regulatory contexts ***Hollington*** has been distinguished, such as the General Medical Council Fitness to Practice Rules 2004, regulation 34(5).

34. Secondly, Mr Goodwin submits that the true basis of ***Hollington*** is that an earlier decision does not later bind an individual who was not a party to the original case. In ***Hollington*** the Court referred to the ***Duchess of Kingston's Case*** (1776) 2 Sm. L. C. 13th ed, 644 where it was said:

> *"A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the Duchess of Kingston's Case (1):*
>
> *"It would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous. And therefore…the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers".*
>
> *This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party."* (emphases added)

35. This principle, and a fuller extract of the ***Duchess of Kingston's case***, were cited by Christopher Clarke LJ in ***Hoyle v Rogers*** (above). Furthermore, in ***Land Securities Plc v Westminster City Council*** [1993] 1 WLR 286, Hoffmann J (as he then was) stated:

> *"In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties. The leading authority for that proposition is Hollington v F. Hewthorn & Co. Ltd. [1943] K.B. 587, in which a criminal conviction for careless driving was held inadmissible as evidence of negligence in a subsequent civil action".*

36. In *Simms v Conlon* [2006] EWCA Civ 1749, Moore-Bick LJ addressed the same issue in the context of argument as to whether challenge to an earlier finding would amount to an abuse of process:

> *"168. In my view it is necessary to be particularly cautious before holding that it would be an abuse of process for a party to challenge findings of fact made in previous proceedings between himself and a person who is not a party to the current litigation. Normally such findings are binding only between the immediate parties to the proceedings and their privies; indeed, in accordance with what has become known as the rule in Hollington v Hewthorn (Hollington v F. Hewthorn & Co Ltd [1943] 1 KB 587) the earlier decision is not admissible as evidence of the facts on which it is based. Whatever may be said about the decision in that case, it has never been suggested that findings of fact made in previous proceedings could be more than evidence of such facts in later proceedings involving different parties. It follows, therefore, that some additional factor must be present to justify preventing a party to the current proceedings from challenging findings of fact made in the earlier proceedings.*
>
> *……*
>
> *170. In some of the cases dealing with abuse of process one can see that, although the earlier proceedings were between different parties, the parties to the current proceedings were both so closely involved in them that they should be required to accept the outcome for better or worse. In North West Water Ltd v Binnie & Partners [1990] 3 All ER 547 (one of the cases considered in Secretary for Trade and Industry v Bairstow) the defendants were consulting engineers engaged to design and supervise the construction of an underground tunnel link and valve house. As a result of an accident in which visitors to the project were killed and injured proceedings were brought against the water authority and the engineers. The court apportioned liability between the different defendants, but no contributions notices were served and formally, therefore, there were no proceedings between them capable of giving rise to an issue estoppel. Nonetheless, the court held that since the issues relating to the negligence of the engineers had been fully considered in proceedings to which both they and the water authority were defendants, it would be an abuse of process for the engineers in subsequent proceedings brought against them by the water authority to dispute the finding of negligence made against them in those former proceedings".*

37. This is an analysis which Leggatt J considered in *Rogers v Hoyle* at [103] – [104] where he said:

> *"103. In the case of judgments in previous civil proceedings, I respectfully agree that this reasoning is compelling, once it is recognised that the opinion of a civil court on a question of fact is not as a matter of principle entitled to be treated as authoritative other than as between the parties to the proceedings. (Different considerations apply to criminal convictions, which can be seen as more nearly resembling judgments in rem.)*

> *104. As in the case of the rule which excludes opinion evidence generally, therefore, the true justification for the rule in Hollington v Hewthorn, as I see, it is not that the opinion of an earlier court is irrelevant but lies in the requirements for a fair trial. The responsibility of a judge to make his or her own independent assessment of the evidence entails that weight ought not to be attached to conclusions reached by another judge – all the more so where the party to whose interests the conclusions are adverse was not a party to the earlier proceedings. That, I think, was the principle which the Court of Appeal was expounding in Hollington v Hewthorn. In relation to previous judgments of a civil court this approach was, moreover, endorsed by the Law Reform Committee. In explaining why it did not recommend any change to the law with regard to the admissibility of such judgments, the Committee said:*
>
> *"As we have already pointed out, in civil proceedings the parties have complete liberty of choice as to how to conduct their respective cases and what material to place before the court. The thoroughness with which their case is prepared may depend upon the amount at stake in the action. We do not think it just that a party to the second action who was not a party to the first should be prejudiced by the way the party to the first action conducted his own case, or that a party to both actions, whose case was inadequately prepared or presented in the first action, should not be allowed to avail himself of the opportunity to improve upon it in the second.""*

38. In my view, the true analysis of the principle that the Court was considering in ***Hollington*** was the reasoning in ***Duchess of Kingston*** that an earlier decision should not be binding on the facts on those who were not parties to the proceedings. However, that does not appear to actually have been the Court's reasoning in ***Hollington***. As is set out in the passages above, the Court of Appeal did not limit its reasoning to the earlier judgment not being binding on a third party but applied a much broader approach.

39. Therefore, although that analysis might be a basis for overruling ***Hollington*** as being wrongly decided, or at least limiting it to that narrower proposition, I do not consider that that is a matter I can decide. It is not open to me to say that ***Hollington*** was wrongly decided because it is a decision of the Court of Appeal and I am bound by its ratio.

40. Mr Goodwin's third ground for distinction is that the reasoning in ***Hollington*** turned on the fact that the factual issues in the two cases were not identical. In contrast in the present case, the facts the LA wishes to rely upon are precisely those which formed the basis of the criminal convictions. There are no different facts and therefore ***Hollington*** can be distinguished.

41. Fourthly, Mr Goodwin points to the change in approach to foreign convictions and principles of comity, particularly in cases within the EU and the Council of Europe, since the date ***Hollington*** was decided. The Law Reform Committee in its Fifteenth Report, which led to the Civil Evidence Act 1968, explained its position as follows:

> *"We have restricted our recommendation to convictions by courts of competent jurisdiction in the United Kingdom. We do not include convictions by foreign courts. This is for practical reasons. The*

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

42. Tugendhat J observed in *Director of the Assets Recovery Agency v Virtosu* that *"the credit which this court gives to the judgments of foreign courts has changed greatly over the years, in particular in relation to the courts of countries which are members of the Council of Europe, and who are thus subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, as is the case with France".* He also considered whether Parliament intended that a foreign conviction should be treated as irrelevant to prove matters required by the Proceeds of Crime Act 2002. By reference to Recovering the Proceeds of Crime: A Performance and Innovation Unit Report (June 2000), issued by the Cabinet Office, the judgment states:

> *"[44] In support of this conclusion, Miss Dobbin also referred to the developing climate of mutual respect for the administration of justice in states in respect of which the European arrest warrant is available. Moreover, although the conclusion I have reached does not depend upon anything stated in the report, it is consistent with the following passage:*
>
> *'11.52 In an EU of free movement of capital and persons, there is little justification for treating requests for restraint and confiscation of assets from other EU jurisdictions in the same way as requests from other parts of the world. This unnecessary impediment acts to increase the ease with which criminals can frustrate law enforcement efforts to recover assets. The UK has therefore promoted the mutual recognition of judicial decisions at EU level. And it has pressed for the mutual recognition of restraint orders to be the first area subject to any new mutual recognition agreement. At a special meeting of the European Council in October 1999 during the Finnish Presidency at Tampere, the Council decided to enhance mutual recognition of member states' judicial decisions'".*

43. An important safeguard in respect of European Union ('EU') and Council of Europe States is that their criminal justice systems are required to comply with European Convention on Human Rights ('ECHR') principles, in particular those within Article 6.

44. Mr Goodwin points to a wide range of provisions by which EU members take into account each other's convictions, which applied in the UK until Brexit. Further, foreign convictions are themselves admissible in England under the bad character provisions of the Criminal Justice Act 2003 ('CJA'). In ***R v Kordasinski*** [2006] EWCA Crim 2984, the Defendant did not dispute the fact of his convictions in Poland but maintained that he had been wrongly convicted, disputing evidence which the Polish court had accepted. The Crown Court judge admitted the convictions under s.101(1)(d) or (g) of the CJA. The Court of Appeal upheld that decision.

45. Mr Norton, on behalf of the Guardian, largely supports Mr Goodwin's submissions. He did raise an argument that Article 6 of the ECHR might be breached if the convictions were not admissible because of the impact on the children's fair trial rights. It was not entirely clear how Mr Norton put this point and I asked for further written submissions from the parties. No party found any caselaw that was directly on the point and, given that I have concluded that ***Hollington*** can be distinguished in the present case, I decided not to consider the ECHR argument further.

46. Mr Vine, who appeared for E, submits that ***Hollington*** is binding upon this Court. He submits that E's convictions cannot be admitted as proof of the underlying facts, although he accepts that the trial judge can and will be aware of the convictions. He submits that the LA will have to prove the facts and can seek to do so by compelling E to give evidence and cross examining him. The burden of proof in proving threshold will rest on the LA.

47. He submits that ***Hollington*** applies to this case and there is no statutory exception which arises here. He refers to the large number of instances in which it has been applied, including by the Court of Appeal, House of Lords and Privy Council, which can be summarised as follows:

    (1) It has been applied in respect of the admission in evidence of previous convictions in subsequent prosecutions – ***Hui Chi-Ming v the Queen*** [1992] 1 AC 34, Lord Lowry;

    (2) It has been applied in respect of the admission in evidence of family court findings of fact in criminal proceedings – ***R v Levey*** [2006] EWCA 1902, Sir Igor Judge P at [58];

    (3) It has been applied in respect of the admission in evidence of previous findings of fact in civil proceedings – ***Three Rivers District Council v Governor and Company of the Bank of England (No 3)*** [2003] 2 AC 1 (HL), ***Secretary of State for Trade and Industry v Bairstow*** [2004] Ch 1 (CA), ***Conlon v Simms*** [2008] 1 WLR 484 (CA) – the summary in ***Rogers and another v Hoyle*** [2015] QB 265, Leggatt J at [88];

    (4) It has been applied in respect of the admission in evidence of a foreign judgment in civil proceedings – ***Caylon v Michailaidis*** [2009] UKPC 34 (PC) (the foreign jurisdiction in that case was Greece) – again see the summary in ***Rogers and another v Hoyle*** [2015] QB 265, Leggatt J at [89];

(5) It has been confirmed to some degree in respect of the admission of an air accident investigation report in civil proceedings - *Rogers and another v Hoyle*;

(6) It has been treated as applicable to the wider issue of issue estoppel in civil proceedings in *Hall and Co v Simons* [2002] 1 AC 615, Lord Hoffman at [702] and Lord Hobhouse at [751] (with some criticism from Lord Hoffmann, but not from Lord Hobhouse).

48. Mr Vine also submits that the rule has been treated as applicable in respect of the admissibility of previous findings in evidence in committal proceedings – *Re L (A Child); Re Oddin* [2016] EWCA Civ 173, Sir James Munby P at [68]. However, I note that it is clear that the view set out at [68] was only a provisional one, did not form part of the ratio and Munby P says: *"this is a complicated matter which may require careful examination on some future occasion; so I say no more about it".*

49. The rule in *Hollington v Hewthorn* has been applied twice at first instance in respect of the admissibility in evidence of a foreign conviction in civil proceedings: in *Daley v Bakiyev* [2016] EWHC 1972 (QB), Supperstone J at Appendix [25] and [26] and *Vadim Don Benyatov v Credit Suisse Securities (Europe) Limited* [2022] EWHC 135 (QB), Freedman J at [386]. The foreign jurisdictions in those two cases were, respectively, the Kyrgyz Republic and Romania.

50. In *Daley v Bakiyev*, Supperstone J said:

> *"23. Mr Donovan submits that notwithstanding the rule in Hollington v F. Hewthorn & Co. Ltd [1943] KB 587, the convictions and factual findings are admissible. He submits that the district court's decision amounts to quasi-expert evidence comparable to that of the AAIB report in Rogers v Hoyle and admissible on that basis.*
>
> *24. Mr Donovan notes that the decision runs, in translation, to 12 closely typed pages. It contains a detailed recitation and analysis of the evidence, lay and expert; and the court addressed at length the motive for the shooting, the means available to the defendants, and their opportunity.*
>
> *25. I do not accept this submission. The factual findings of a court, subject to the statutory exception, are not admissible as evidence of the facts so found. I agree with the conclusion of Mr Justice Leggatt in Rogers v Hoyle (confirmed by the decision of the Court of Appeal) that unless and until it is reconsidered by the Supreme Court, the rule in Hollington v Hewthorn must, except insofar as it has been reversed by statute, be taken to represent the law (para 90).*
>
> *26. The position as regards domestic convictions was changed by section 11 of the Civil Evidence Act 1968. There is no comparable statutory provision relating to foreign convictions."*

51. In *Vadim Don Benyatov v Credit Suisse Securities (Europe) Limited*, Freedman J said:

> *"386. If the Court is wrong in the above analysis, in my judgment, at this level the Court is bound by the rule in Hollington v Hewthorn to the effect that a conviction is inadmissible at a second trial. It is no more than the expression of the opinion of the tribunal as to the guilt of the accused, and as such was irrelevant at the second trial. The rule is no longer applicable as regards convictions in the UK by reason of the operation of ss11, 13 of the Civil Evidence Act 1968. The case has been criticised, and it has even been said that it is generally considered to have been wrongly decided: see Hunter v Chief Constable of the West Midlands [1982] AC 529 at 543, per Lord Diplock and see also Lord Hoffmann's comment in Arthur JS Hall & Co v Simons [2002] 1 AC 615 at 702 that the Court of Appeal in Hollington v Hewthorn was "generally thought to have taken the technicalities of the matter much too far".*
>
> *387. In a detailed analysis in Phipson on Evidence 19th Ed. at 43-79, it is stated:*
>
> *"Notwithstanding recent criticisms of the decision which have high authority, Hollington v F Hewthorn & Co Ltd was treated as clear authority by the Privy Council in Hui Chiming v R. [1992] 1 A.C. 34 PC at 43, [that a conviction "amounted to no more than evidence of the opinion of that jury"]. Consequently it is probably safe to say that the rule still applies in all cases not covered by a common law exception (see paras 43–81 to 43–84) or the various statutory exceptions (see paras 43-85 et seq.)*
>
> *...*
>
> *In Al-Hawaz v The Thomas Cook Group Ltd [Keene J. 27.10.00. New Law Online 2001 019305"] the scope of the rule in Hollington v F Hewthorn & Co Ltd was challenged. It was argued that the decision is only binding authority on the admissibility of previous criminal convictions. Whilst accepting that this originally would have been correct, the court held that the decision had been applied to civil judgments in subsequent cases by higher courts. Moreover, the reasoning of Hollington is logically applicable to earlier civil judgments; both criminal and civil judgments are technically expressions of opinion and inadmissible as such. The court affirmed that the principles adumbrated in Hollington remain applicable to findings in earlier civil cases as well as earlier criminal cases."*
>
> *388. I accept this as a correct exposition of the law as it now stands."*

52. In the Civil Evidence Act 1968 there was a deliberate decision not to include foreign convictions, as is shown by the Law Reform Commission's report referred to above.

53. Mr Vine further submits that there is no exception for Children Act cases. Firstly, *Hollington* has been treated as being of general application and has been applied as such. Secondly, the general position in children's cases is that there is no strict issue estoppel and that questions of whether an issue can be relitigated are dealt with by discretion in the manner indicated in *In Re B (Care Proceedings: Issue Estoppel)* [1997] Fam 117, Hale J at [128] (as explained more recently in *Re E (Children: Reopening*

Findings of Fact) [2019] EWCA Civ 1447 and *Re CTD (A Child: Rehearing)* [2020] EWCA Civ 1316. This is a separate point from whether there might be an exception to the rule in *Hollington v Hewthorn* but, taken with the fact that mostly family courts will have been concerned with convictions from courts in the United Kingdom, it may explain why the issue relating to the admissibility in evidence of *foreign* convictions has, seemingly, not arisen before. I note at this point that it is somewhat surprising that the argument about *Hollington* in family proceedings has not arisen before given that it is not uncommon for foreign convictions to arise. Mr Vine's explanation that they have been approached on the basis of the Court assuming it has a discretion may be correct.

54. Even if the rule in *Hollington v Hewthorn* was taken as an expression of the principle of *res judicata*, the Spanish convictions here were not *res inter alios acta* in respect of *either* the mother *or* the court. The decision in *Re W (Care Proceedings)* [2008] EWHC 1188 (Fam), McFarlane J at [70] to [76] provides a clear example of a case where even a previous guilty plea was not conclusive of the issue in the family court:

> *"76. The question: can the court rely upon his plea of guilty as sound evidence that he did indeed perpetrate the fracture is answered in the single word 'no'. It is necessary, in my view, and in the interests both of justice and of these children, to clear the board and, for the purposes of the fact-finding hearing, not to rely upon the guilty plea and the conviction as establishing that he was indeed the perpetrator of the fracture."*

55. Mr Kingerley, on behalf of the Mother, largely follows Mr Vine's submissions. He argues that the Mother was not party to the Spanish proceedings and therefore should not be bound by them.

56. As an alternative submission, Mr Kingerley submits that there may be a parallel with Tugendhat's decision in *Vertosu* in as much as the CA proceedings are based upon the Spanish convictions.

Conclusions

57. There are in essence three questions I need to consider. Is this Court bound by *Hollington*? If *Hollington* can be distinguished, should I choose to follow it? If I do not follow it, then what is the correct approach to the facts underlying the convictions?

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

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

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

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

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

62. Secondly, an important part of the Court's reasoning in *Hollington* was that the two decisions were not considering identical facts. The civil trial had to bring into play in its consideration of the accident other factors, including contributory negligence. This is made particularly clear by Lord Diplock's speech in *Hunter v Chief Constable of West Midlands Polise*, see above, and Lord Lane CJ in the Court of Appeal in *Re A:A Solicitor*.

63. In the present case, the facts relating to the Spanish convictions are identical to the facts relevant in the current proceedings. The simple question is whether E committed the facts as charged, and there are no additional elements that are relevant to that part of the threshold findings sought by the LA. Therefore, *Hollington* can be distinguished on that ground alone.

64. Thirdly, as Leggatt J set out in *Hoyle v Rogers*, one analysis of *Hollington* is that it was concerned with ensuring fairness to a third party who was not a party in the original proceedings. As I have explained above, I am not convinced that this was central to the reasoning of the Court of Appeal in *Hollington*. However, it certainly lay behind the reasoning in the earlier judgments, including that in *Duchess of Kingston*. That issue does not arise in the present case. E was a party to the criminal proceedings in Spain and is a party to the present proceedings. In my view, it is irrelevant that the Spanish prosecutor is not a party to the present proceedings, or that the LA was not a party to the Spanish proceedings. Plainly, the concern of the courts has been to protect the interests of someone who might be adversely affected by finding him/herself bound by earlier findings they had no ability to influence. That does not arise in the present case in respect of E.

65. Mr Kingerley argues it would be unfair on the Mother to be bound by the findings. But in my view that submission is somewhat misconceived. The Mother is not bound in any true sense by these findings. They impact upon her interests as they do those of the children, but they are findings in respect of E not the Mother. Importantly, the Mother is not in a position to give evidence that has any relevance to the findings.

66. Fourthly, given the factual position E now stands in, Mr Vine's submissions would put the trial judge in something of an absurd position. He could take into account the Notification Order and E's conviction for his non-compliance with this Order. However, on Mr Vine's case, he could not rely on the underlying facts which led to the convictions and the subsequent conviction in England. In my view, I should seek to reach an outcome which avoids the judge having to go through such legal contortions.

67. For all these reasons I consider that ***Hollington*** can be distinguished.

68. Moving to the next stage of the analysis, I have no doubt that it is appropriate to depart from ***Hollington***, effectively for two reasons.

69. The reason the Law Reform Commission did not recommend including foreign convictions in the Civil Evidence Act 1968 was its concerns about foreign judgments. However, as Mr Goodwin explained, the law on foreign judgments has moved on enormously since 1968, and the degree both of procedural safeguards, certainly within Council of Europe States, and of principles of comity are quite different now.

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

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

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

73. Mr Goodwin argues that the burden should be on E to prove that the facts found in the convictions were not true. Mr Vine argues that even if the convictions can be taken into account for the truth of the facts, there is no burden on E. In my view, Mr Goodwin must be correct on this point. If the conviction can be taken into account as proof of the underlying facts, then the burden must be on E to prove that the convictions were erroneous. The matters which he seeks to rely on are wholly within his knowledge and the position should be the same as for a domestic conviction - there is a presumption that the conviction was valid, but that is rebuttable on the balance of probability. Given that I have found the convictions can be taken into account as evidence of the underlying facts, it must follow that the burden of displacing that evidence is on E.