



Neutral Citation Number: [2007] EWCA Civ 1277

Case No: B4/2007/1954

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE FAMILY DIVISION
MR JUSTICE MUNBY
FD07P01490

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2007

Before:

LORD JUSTICE THORPE
LORD JUSTICE WALL
and
LORD JUSTICE LAWRENCE COLLINS

Between:

AD

Appellant

- v -

CD

1ST

- v -

Respondent

AD

2ND

Respondent

Mr A D appeared in person - Appellant
Mrs C D appeared in person – 1st Respondent
Mr T Gupta (instructed by Dawson Cornwell) for the 2nd Respondent

Hearing dates: 23rd October 2007

Approved Judgment

Lord Justice Thorpe:

I Introduction

1. This is the judgment of the court, to which all of its members have contributed. Because of the urgency inherent in the nature of the proceedings, we indicated at the close of the hearing of this appeal that the appeal would be dismissed, and that reasons would be given in writing.
2. This appeal concerns the application to a Romanian contact order of Council Regulation (EC) 2201/2003 (“Brussels II Revised”) of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 (“Brussels II”).
3. The first instance court in Romania made a contact order on 24th October 2006. Some days later (within the fifteen days allowed) the father filed a Notice of Appeal. On 19th March 2007, at the hearing before the Appeal Court, the father withdrew his appeal. On 28th March 2007 the Appeal Court accordingly sealed the order of 24th October 2006 and on 27th April 2007 the Romanian Court issued a certificate under Article 41 of Brussels II Revised in the form provided in Annex III to the Regulation. The judgment certified was that of the 24th October 2006 rendered final and enforceable by the order of the 19th March 2007.
4. Romania acceded to the European Union on the 1st January 2007. The question is whether the judgment is enforceable under Brussels II Revised. By a judgment of the 1st August 2007 Munby J held that the order certified was the order of the 24th October and was accordingly unenforceable under the provisions of Brussels II Revised because it pre-dated Romania’s accession to the European Union.
5. At an oral hearing of the 11th October the father’s application for permission to appeal was adjourned to a further oral hearing on notice with the appeal to follow if permission granted. That decision was based largely on fresh evidence, namely a letter of 9th October 2007 from the Secretary of State in the Ministry of Labour Family and Equality of Chances in Bucharest.

II Background

6. The parents are Romanian. They married there, their only child, A, was born there in 1998 and there they divorced in 2000. In 2002 the mother unilaterally removed A from his homeland to this jurisdiction, effectively destroying his relationship with his father. Proceedings under the Child Abduction and Custody Act 1985 and the Hague Convention on the Civil Aspects of International Child Abduction 1980 were issued in February 2003. Those proceedings were not resolved until the House of Lords delivered judgment on 16th November 2006. The House reversed the return orders made below: [2007] 1 A.C. 619. One effect of these inordinately prolonged proceedings was to extend the separation between the child and his father.
7. The order made in Bucharest some three weeks before the conclusion of the Hague Convention proceedings was an order made on the mother’s application for variation of contact. Her proposal, endorsed by the judge, was that the father should have

regular staying contact, including ten days during the Christmas holidays and all of August.

8. The father sought the enforcement of the certified Romanian order by an originating summons of the 18th June 2007. This application, like his previous application under the 1980 Hague Convention, became enmeshed in legal complexity, which we have explained above.
9. The D family has suffered greatly as a consequence of becoming enmeshed in these legal complexities. The principal casualty has been the relationship between father and son.

III The issue

10. Before Munby J on 1st August 2007 the parents appeared in person and the child by Mr Teertha Gupta. It was the House of Lords which had granted A party status, appointing Mr John Mellor as his guardian. That litigation team, save leading counsel, constituted for the purposes of the Hague Convention appeal has remained in place for the Brussels II Revised issue raised by the father's originating summons of the 18th June 2007. Thus in determining the pure points of law raised by the originating summons Munby J had the assistance of only one counsel and we are in the same position. We are obviously grateful to Mr Gupta for his efforts and also to Mr D who presented his argument most effectively in clearly spoken English. We will come to their respective submissions later.
11. It is convenient now to set out the relevant provisions of Brussels II Revised, namely Recital 23 and Articles 41 and 64:

“(23) The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be ‘automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement’. This is why judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of this Regulation should be recognised and enforceable in all other Member States without any further procedure being required. Arrangements for the enforcement of such judgments continue to be governed by national law.”

“Article 41

Rights of access

1. The rights of access referred to in Article 40(1) (a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.

2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:

(a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;

(b) all parties concerned were given an opportunity to be heard;

and

(c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity. The certificate shall be completed in the language of the judgment.

3. Where the rights of access involve a cross-border situation at the time of the delivery of the judgment, the certificate shall be issued *ex officio* when the judgment becomes enforceable, even if only provisionally. If the situation subsequently acquires a cross-border character, the certificate shall be issued at the request of one of the parties.”

“TRANSITIONAL PROVISIONS

Article 64

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72.

2. Judgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance

with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

3. Judgments given before the date of application of this Regulation in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.
 4. Judgments given before the date of application of this Regulation but after the date of entry into force of Regulation (EC) No 1347/2000 in proceedings instituted before the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings and that jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.”
12. Munby J identified the two essential points of law. The first was whether the enforceable order was the order given on the 24th October 2006 or the appellate order of the 19th March 2007. The second point was whether the transitional provisions contained in Article 64 rendered enforceable an order made by a Romanian court prior to Romania’s accession.
 13. Finally he considered the father’s additional submission that the certificate itself was duly issued in the form required by Annex III to Brussels II Revised and, being lawful on its face, must be automatically enforced without enquiry, particularly having regard to Recital 23 to the Regulation.
 14. Munby J held, in a careful and convincingly reasoned judgment, that the order sought to be enforced was given on 24th October 2006 (as indeed the Certificate itself stated on its face); that Article 64 provided only for transition between Brussels II and Brussels II Revised; and that the application must be well-founded not according to Romanian law but according to the autonomous law of Brussels II Revised, a foundation clearly lacking given his rejection of the father’s submissions on the two previous points of law.

IV Additional Evidence

15. In those circumstances we now focus on the additional evidence and the resulting submissions on the appeal. The additional evidence consists of a letter of 9th October 2007 to the father from Mariela Neagu, Secretary of State at the Ministry of Labour Family and Equality of Chances in Bucharest. Second there is a letter to the father dated 18th October 2007 from the Deputy Ombudsman for Romania. This second letter only unfolds the father's right to contact with A, given that A's parents are living in separate states. It is the earlier letter that requires careful consideration since it expressly criticizes the judgment of Munby J and supports the father's contentions on the appeal.
16. After a careful review of the facts the writer emphasises that once an appeal against the order of 24th October 2006 was filed that order "did not have, according to Romanian law, any legal effects." Only when the appeal was abandoned did the order of 24th October become "final and was vested with the enforcement formula." The writer continues: -

"As it had no legal effects until the moment of the appeal decision, respectively March 19th, 2007, the Civil Court Order No. 15544/October 24th, 2006 could not have been considered an order in the meaning of Bruxelles II (revised).

The Civil Court Order No. 15544/October 24th, 2006 became such an order at the moment when, following the Decision of the Bucharest Tribunal, it became final and enforceable, therefore opposable to third parties, including the authorities of the signatory States of Bruxelles II (revised). We mention that, on the date specified in the vesting seal, March 28th, 2007, a date at which Romania was a member of the European Union, the provisions of Bruxelles II (revised) were obviously, applicable to the above-mentioned court order.

We further emphasize that, in accordance with the Romanian judiciary procedures, if the decisions of a first instance court of law and of the appeal court coincide, the appeal court does not re-write the original decision, but it orders the first instance court (in our case, the Court of Law of Sector 1, Bucharest) to vest the decision (to give it legal force and enforceability), deciding that the sentence is final and enforceable and serve it, on request, to the parties concerned.

Moreover, it is important to underline the fact that the certificate issued in accordance with art. 41 of Bruxelles II, includes the child visitation program and takes into account the Civil Court Order No. 15544/October 24th, 2006, vested with the formulas of: final and enforceable.

We are of the opinion that the interpretation made by the honourable British magistrates in their argumentation of the decision passed by the High Court of Justice on the date of

August 1st, 2007, was based on insufficient information regarding the Romanian judiciary procedure.

At the same time, we consider that, when analyzing the contents of the Civil Order, it should be taken into account “ad integrum”, meaning that it should include the stamps and seals applied by the competent Romanian courts and the date when they were so applied, namely, March 28th, 2007. We emphasize again that the Civil Court Order No. 15544/October 24th, 2006, could not be analyzed only in part, regarding only the date when it has been originally passed (October 24th, 2006) as, in accordance with the Romanian legislation, it could produce no effects from the legal point of view, until using out the ways if appeal and its vesting with the formulas: “final” and “enforceable”.

Taking into account the fact that the at the date when the Civil Court Order No.15544/October 24th, 2006 became final and enforceable, i.e., on March 28th, 2007, (“given” in the meaning of the Bruxelles II (revised), as well as at the date of issue of the certificate according to art. 41, Romania had the quality of a Member State of the European Union with full rights and obligations, the National Authority for the Protection of the Rights of the Child, in its quality of the Central Authority for the protection of the child’s rights in Romania, through intervention, under the conditions of the law, into administrative and judiciary procedures regarding the observance and promotion of the child’s rights, considers to be necessary the interpretation of the provisions of the Civil Court Order No. 15544/October 24th, 2006 in accordance with the Romanian law and act with all due diligence in view of having same enforced by the competent British authorities as it has all attributes in the meaning of the provisions of art. 41 of EC Regulation No.2201/2003 and it had been given in a Member State.”

17. This careful analysis provides the basis of Mr D’s submissions as follows:
 - i) According to Romanian law he had fifteen days in which to exercise his right of appeal. He filed the requisite notice a few days after 24th October, well within the time permitted. A court at first instance cannot issue a certificate pursuant to Article 41 of Brussels II Revised until either the expiration of fifteen days without the filing of a Notice of Appeal, alternatively until the determination of any appeal initiated within that period.
 - ii) It is the determination of the Appeal Court that creates an enforceable order (either by confirming the order below or by substituting some different order). That signals the arrival of an “enforceable order” within the terms of Article 41, an order that the Appeal Court then has the duty to certify under Article 41(2) that is the law of Romania.

- iii) The clear objective of Brussels II Revised is to ensure that a contact order made in Member State A is to be immediately enforceable in Member State B (as though made in Member State B) provided that the order is duly certified under Article 41.

V Conclusions

18. We have great respect for those submissions, particularly given that their foundation derives from the letter from the Secretary of State. Romania has been particularly committed to the proper operation of Brussels II Revised and to the effective function of the European Judicial Network. In the field of family justice close cooperation has been established between the Ministries of Justice in London and Bucharest. We recognize the sincerity and rationality of the opinion of the Secretary of State to the effect that Munby J misunderstood the relevant provisions of Romanian law and impermissibly refused to give effect to the certificate of 27th April 2007.

19. However the question of whether enforceability flows from the first instance order or only from the order of the appellate court engaged by the issue of a notice of appeal is considered in the Practice Guide for the Application of Brussels II Revised. Although the Practice Guide does not have the force of law it commands great respect given that it was issued by the Commission approving the draft written by a Committee of Experts, upon which Singer J served. In Chapter VI paragraph 4(a) states: -

“The access rights involve a cross-border situation

If, at the time the judgment is issued, the access rights concern a cross-border situation e.g. because one of the parents is a resident of or plans to move to another Member State, the judge shall issue the certificate of his/her own initiative (“ex officio”) when the judgment becomes enforceable, even if only provisionally.

The national laws of many Member States provide that judgments on parental responsibility are “enforceable” notwithstanding appeal. If national law does not enable a judgment to be enforceable, whilst an appeal against it is pending, the Regulation confers this right on the judge of origin. The aim is to prevent dilatory appeals from unduly delaying the enforcement of a decision.”

20. This guidance leads Mr Gupta to submit that the first instance judge clearly has the power to certify, even if an appeal is predicted or issued. So much is clear from the second paragraph of Article 41(1).
21. In our judgment the flaw in Mr D’s argument, and indeed in the reasoning of the Secretary of State, is that the points of law in issue are not to be decided solely in accordance with Romanian law but in accordance with Brussels II Revised.
22. Romania (together with Bulgaria) acceded to the EU on 1st January 2007 pursuant to the Treaty of Accession of Bulgaria and Romania signed on 25th April 2005: [2005]

O.J. L157/11. The conditions of admission and the adjustments to the Treaties entailed by the admission are set out in the Act of Accession: [2005] OJ L157/203.

23. Article 2 of the Act of Accession provides:

“From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act”.

24. Upon the accession, therefore, of Romania to the EU on 1st January 2007, acts such as Brussels II Revised became binding on Romania and applicable within Romania.

25. Articles 19, 20 and 21 of the Act of Accession provide for adaptations to acts and measures adopted by Community institutions as set out in Annexes III, IV and V to the Act of Accession. These deal in great detail with adaptations to Regulations, for example in the fields of company law, agriculture, taxation, and competition policy. None of these Annexes affects Brussels II Revised.

26. Minor and consequential changes were made to (inter alia) the Brussels Regulation on jurisdiction and enforcement of judgments in civil and commercial matters (Council Regulation 44/2001) by Council Regulation 1791/2006, but there is no equivalent Regulation dealing with Brussels II Revised.

27. Consequently the solution to the problem depends on a construction of Brussels II Revised in the light of the fact that (a) Romania became a Member of the EU only on 1st January, 2007; and (b) as from that date, by virtue of Article 2 of the Act of Accession, Brussels II Revised became binding from that date.

28. Our conclusion is that the judgment was given on 24th October 2006. It was the judgment of 24th October 2006 which was declared enforceable on 17th March 2007. Brussels II Revised distinguishes in several places between a judgment and an enforceable judgment (see Articles 28(1), 41(1), 41(3), and 42(1)), and in our view this supports the conclusion that it is the original judgment and not the order declaring it enforceable which is the relevant judgment.

29. In those circumstances it seems to us plain that when it was given it was not “an enforceable judgment given in a Member State” within the meaning of Article 41(1) because Romania was not on 24th October 2006 a Member State, and in our judgment that concludes the matter.

30. Since we announced our decision in this appeal the European Court has given its ruling in Case C-436/06 C, 27th November, 2007. In that case the European Court applied Article 64(2) of Brussels II Revised in the case of the enforcement in Finland of a Swedish care order. The order had been made after Brussels II Revised came into force, in proceedings commenced after Brussels II came into force. Finland and Sweden have been members of the European Union since 1995, and both were subject to each of the Regulations. There was therefore no problem about the applicability of Article 64(2), and the ruling has no relevance to the issue of the effect of the

admission of new Member States. That part of the decision is therefore of no assistance in the present case on that issue.

31. In that case the original order had been made by a Social Welfare Board in Sweden in February 2005, and the decision of the Social Welfare Board was confirmed by a Swedish County Administrative Court on 3rd March 2005.
32. Advocate General Kokutt considered whether the administrative decision of the Social Welfare Board could be that of a “court” for the purposes of Article 2(1), and therefore whether its decision could be a judgment. Her view was that administrative decisions might in principle be recognised and enforced in another Member State on the basis of Brussels II Revised, and she went on (at para 66):

“However, the relevant decision must be enforceable in the State of origin before it may be enforced by a court of another Member State by way of cooperation (Article 28(1) of Regulation No 2201/2003). It must at least have external consequences in order that it may be regarded as a judgment which has been given, and this is to be determined by the *lex fori*. Since, under Swedish law the effect and enforceability of the decision apparently depended on its being confirmed by the *Länsrätt*, it seems correct to regard the date of confirmation by the court as determinative for the purposes of Article 64(2) of the regulation. In any event, it is a matter for the national court to determine which is the enforceable decision under national law.”

33. The European Court did not rule on whether the decision of the Social Welfare Board was a judgment, nor did it rule on the question whether a decision making a previous decision enforceable is the relevant decision. The Court said (at para 71): “... according to the national court, which alone has jurisdiction to assess the facts of the case in the main proceedings, the decision the enforcement of which is at issue in the main proceedings is that of the [Swedish County Administrative Court] of 3 March 2005. It was therefore delivered after the date on which Regulation No 2201/2003 came into force.”
34. Nothing in the ruling of the European Court or in the opinion of Advocate General Kokutt has altered our conclusion that relevant decision the enforcement of which is at issue is the order of 24th October 2006. In Case C-435/06 C it seems plain that the order of the Swedish County Administrative was a confirmation of the decision of the Social Welfare Board, and not simply (as in this case) a certificate of enforceability of an earlier judgment. Consequently, whether or not the opinion of the Advocate General (which is, of course, entitled to the greatest respect) is right, in our judgment there is no basis for regarding the order of 19th March 2007 as the relevant judgment.
35. It is not necessary to decide whether the judgment would have been enforceable had it been given after 1st January 2007, but we say a few words about the problem which will arise only in relation to judgments given after that date in proceedings commenced before that date.

36. By Article 64(1) Brussels II Revised applies only to agreements concluded and legal proceedings initiated after its date of application. If the matter stood there it would be plain that it did not apply to this judgment because the proceedings were commenced prior to the date Brussels II Revised applied to Romania. But Article 64(1) refers to the “date of application in accordance with Article 72” and Article 72 refers to the application of the Regulation from 1st March 2005. If this applied literally Brussels II Revised would apply to the proceedings in the present case which were commenced long after 1st March 2005.
37. So also, read literally, Articles 64(2) and 64(3) might apply. Article 64(2) provides that judgments given after the application of Brussels II Revised in proceedings instituted before that date but after entry into force of Brussels II (on 1st March 2001) are to be recognised and enforced under Brussels II Revised if jurisdiction was founded on rules which accorded with those in Brussels II or Brussels II Revised. Article 64(3) provides that judgments given before the date of application of Brussels II Revised in proceedings instituted after the entry into force of Brussels II are to be recognised under Brussels II Revised if they relate to (inter alia) parental responsibility for the children of both spouses.
38. These provisions are in Chapter VI which is headed “Transitional provisions” and deal primarily with the relationship between Brussels II and Brussels II Revised.
39. It seems plain that the drafting of Brussels II Revised did not cater for the admission of new Member States, and that a problem arises because the point has not, apparently, been addressed in the accession documents.
40. We do not consider that the solution is to be found in a literal interpretation of Article 64, which would lead to manifestly absurd results. Our tentative view (since this is not a question which is necessary to decide) is that a purposive interpretation of Brussels II Revised in relation to the new Member States would involve an interpretation, or application by analogy, of Article 64(1) and (2) which would mean that Brussels II Revised would not apply to proceedings commenced before January 1, 2007, except that it could apply to judgments given after that date provided that jurisdiction was founded on rules which accorded with those in Chapter II of Brussels II Revised.

VI The Future

41. The legal maze from which the D family will at last hopefully emerge risks to obscure the only real issue, namely what should be the contact arrangements for A now that the dismissal of the Hague Convention application means that for the foreseeable future he will remain the child of parents living in different Member States. Clearly he has a right to know his father as well as his homeland. The dismissal of this appeal lodges judicial responsibility here in London. This reality was well appreciated by Munby J. On the 1st August he gave firm directions to ensure an expedited hearing of a contact application to be issued by the father. Regrettably the mother did not satisfactorily comply with his fourth direction and ignored his fifth direction entirely. On the 10th September the contact application was adjourned by consent given the pending permission application. However on granting permission on the 10th October the court directed that the appellate process was not to delay further the preparation of the contact application. At the oral hearing before us on 23rd October the mother offered to remedy her disregard of the orders of the 1st August by 26th October. As a

safeguard against delay we announced our decision but reserved our reasons. With Mr Gupta's assistance we were able to arrange for the parties to go straight from our court to appear before Munby J for further directions. We hope that in this exceptional case continuity of judicial responsibility will be achieved and that the application can be expedited to ensure consideration of arrangements for contact over A's Christmas holidays.