Neutral Citation Number: [2012] EWCA Civ 1157

Case No: B4/2012/1109

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MRS JUSTICE MACUR
[20I2] EWHC 938 (Fam)

Royal Courts of Justice
Strand. London, WC2A 2LL
Date: 21st August 2012

Before:

LORD JUSTICE THORPE
LORD JUSTICE MUNBY
and
SIR STEPHEN SEDLEY

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In the Matter of L (A Child)

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Richard Harrison QC and Edward Devereux (instructed by Dawson Cornwell) [none of whom acted for him below] for the appellant father
Marcus Scott-Manderson QC and Cliona Papazian (instructed by Johnson and Gaunt) for the respondent mother

Hearing date : 7 August 2012

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Judgment

Lord Justice Munby :

1. This is an appeal from a decision of Macur J in the Family Division on 24 April 2012: *Re LSdC* [2012] EWHC 983 (Fam). It raises important questions in relation to Council Regulation (EC) No 2201/2003, commonly referred to as Brussels II revised ("BIIR"),[1] which have not previously been considered by the Court of Appeal.

The facts in outline

2. We are concerned with a little boy, L, who was bom in this country on [a date in] 2011. His mother was born in this country, his father in Portugal. They met and formed a relationship - they have never married - when the father was working in Oxfordshire.

3. In June 2011, at a time when the relationship had already come under considerable strain, they all three moved to Portugal, where they lived with the father's parents. The mother attempted to leave Portugal clandestinely with L on 14 November 2011 but this was prevented following police intervention.

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

4. On 23 November 2011 there was a meeting at the Aveiro offices of the Portuguese Commission for the Protection of Children and Juveniles (CPCJ) attended by the father, the mother, and their respective fathers. An agreement was arrived at between the father and the mother, subsequently ratified (homologated) by Assistant Scrivener Costa in the Aveiro Family and Minors Court on 7 December 2011.

5. The agreement was described (I quote from the translation; the original is in Portuguese) as an "Agreement on the Exercise of Parental Responsibilities." The agreement is a short document of nine clauses occupying only two pages. Clauses A and B provide that the parents will "jointly exercise the parental responsibilities relating to issues of particular importance for the life of [L]", except in cases of "clear emergency" where either parent can act alone, and that the "exercise of parental responsibilities on the day to day basis relating to current facts in the life of the Minor is to be met by the parent with whom he is". Clauses C, D and E provide for what Macur J correctly described (para [5]) as arrangements for exactly equal shared care on a rotating two-monthly basis in England and Portugal to endure until L's third birthday. L was to stay with his mother in England in December 2011 and January 2012 and then with his father in Portugal in February and March 2012. Clause F provides that "during the two months that each parent has the minor the other parent as well as the maternal or paternal grandparents will be able to visit the minor whenever they wish". I need not refer to clauses G and H. Clause I provides that the agreement is to be in force until L is three years old "by which time both [parents] will proceed with the alterations that from then on will be better in harmony with the interests and needs of the minor."

6. I must return to this point in due course but for the moment observe that, to adopt English legal terminology, clauses A and B relate to parental responsibility, clauses C, D and E provide for residence, and clause F provides for contact.

7. The Portuguese judge (again I quote from the translation), "having verified the necessary legal requirements and analysed the interests of the minor and with the favourable opinion of the Public Ministry", decided to "homologate" the agreement and "order[ed] the parents to abide by its terms." But he added this caveat:

> "However, I stress to the parents that it is convenient for the child to establish residence with one of the parents as once the child gets older especially from three years old onwards there will be the issue of frequency of pre-school and then school materials which will not fit with the "comings and goings" of the child between the homes of the mother and the father."

The Portuguese court issued certificates in accordance with BIIR: first, on 1 March 2012, a certificate in the form of Annex III, and subsequently, on 27 March 2012, a certificate in the form of Annex II (see below).

8. On 18 December 2012 the mother and L came to this country. It is common ground that this was lawful and in accordance with the agreement. Thereafter the father at least treated the appropriate 'hand over' date as being the 18th rather than the 1st of the relevant month.

9. On 7 February 2012 the mother applied without notice to the Oxford County Court seeking a prohibited steps order and a residence order under the Children Act 1989. The District Judge granted interim relief the same day, including a prohibited steps order to remain in force until the next hearing preventing the father from removing L from the jurisdiction of England and Wales. On 22 February 2012 His Honour Judge Corrie transferred the proceedings to the High Court. His order recited that the father contested the jurisdiction of

the English court. Each parent having undertaken not to remove L from the jurisdiction of England and Wales until further order, Judge Corrie discharged the prohibited steps order. On 2 March 2012 the father applied to enforce the Portuguese decision in accordance with BIER Article 41, relying on the Annex III certificate. He sought a stay of the English proceedings. It is to be noted that although in his application the father described the Portuguese order as relating to "rights of access", and said that what he was seeking was what he called "contact", his application made clear that the basis of his claim was the mother's refusal to comply with clause C of the agreement in relation to February and March 2012. On 6 March 2012 Baron J gave directions, the father maintaining his objection to jurisdiction and the undertakings previously given being continued.

10. The proceedings were heard by Macur J on 26-27 March 2012. During the course of the hearing the father applied also to enforce the Portuguese decision in accordance with BIIR Article 21, relying for this purpose on the Annexe II certificate. On 24 April 2012 Macur J gave a reserved judgment. She dismissed the father's applications. She held that the English court had jurisdiction. Being satisfied, as she said (para [48]), that it was prima facie in the best interests of L to conduct proceedings here, she stayed the Portuguese proceedings pursuant to BIIR article 20 and, with effect from the conclusion of any appeal against her order, lifted the stay of the English proceedings. She re-imposed the prohibited steps order, this time directed to both parents. Her order included provision for interim contact between the father and L in this country pending determination of any appeal or further order. In the event, we were told, the last contact occurred on 2 July 2012, after which the father returned to Portugal.

11. Macur J refused the father permission to appeal. He renewed his application to this court and on 2 July 2012 my Lord, Thorpe LJ, adjourned the application into court on notice with appeal to follow. In accordance with that direction the application came on for hearing before us on 7 August 2012. In the meantime, on 23 July 2012 the mother had filed a respondent's notice.

BIIR

12. Before turning to explain the basis of Macur J's judgment and the father's grounds of appeal it is convenient to set out the relevant provisions of BIIR.

13. I start by drawing attention to some of the Recitals to BIIR:

> "(1) The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.
>
> (2) The Tampere European Council endorsed the principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area, and identified visiting rights as a priority.
>
> ...
>
> (12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an

agreement between the holders of parental responsibility.

(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

...

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.

(22) Authentic instruments and agreements between parties that are enforceable in one Member State should be treated as equivalent to "judgments" for the purpose of the application of the rules on recognition and enforcement.

(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.

(24) The certificate issued to facilitate enforcement of the judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment.

...

(33) This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union."

14. So far as material for present purposes the scope of BIIR is defined in Article 1

"1 This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to ... (b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2 The matters referred to in paragraph 1(b) may, in particular, deal with: (a) rights of custody and rights of access

..."

Article 2 provides so far as material:

> "For the purposes of this Regulation: ...
>
> 7 the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access; ...
>
> 9 the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;
>
> 10 the term "rights of access" shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time".

15. Chapter II of BIIR deals with jurisdiction. Article 8.1 provides that:

> "The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised."

Article 8.2 provides that this is subject to, inter alia, the provisions of Articles 9 and Article 9 provides that:

> "1 Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.
>
> 2 Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction."

Article 12.3 provides so far as material:

> "The courts of a Member State shall also have jurisdiction in relation to parental responsibility ... where:
>
> (a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and
>
> (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child."

16. I should refer also to Articles 13.1, 14, 17 and 20. Article 13.1 provides that:

> "Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction."

Article 14 provides that:

> "Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State."

Article 17 provides that:

> "Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction."

Article 20 provides that:

> "1 In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.
>
> 2 The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate."

17. Chapter III of BIIR deals with recognition and enforcement. Article 21.1 provides that:

> "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required."

18. Article 21 needs to be read in conjunction with Articles 23, 24 and 26. Article 23 so far as material provides that:

> "A judgment relating to parental responsibility shall not be recognised:
>
> (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;
>
> (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought; ...
>
> (d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without

such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought".

Article 24 provides that:

"The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Article ... 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14."

Article 26 provides that:

"Under no circumstances may a judgment be reviewed as to its substance."

19. Chapter III of BIIR provides separate procedures for the enforcement of orders relating to parental responsibility, dealt with in Section 2, and access, dealt with in Section 4.

20. In relation to the former, Article 28.1 provides that:

"A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there."

Article 29.2 provides that:

"The local jurisdiction shall be determined by reference to the place of habitual residence of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates."

Article 30 deals with the procedure to be adopted. Article 37.1(b) provides that the party applying for a declaration of enforceability shall produce the certificate in the standard form in Annex II issued in accordance with Article 39. Article 31 provides that:

"1 The court applied to shall give its decision without delay. Neither the person against whom enforcement is sought,

nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application.

2 The application may be refused only for one of the reasons specified in Articles 22, 23 and 24.

3 Under no circumstances may a judgment be reviewed as to its substance."

21. Section 4 applies in relation to the enforcement of access orders. Article 40 provides that:

"1 This Section shall apply to:

(a) rights of access ...

> 2 The provisions of this Section shall not prevent a holder of parental responsibility from seeking recognition and enforcement of a judgment in accordance with the provisions in Sections 1 and 2 of this Chapter."

Article 41.1 provides that:

> "The rights of access referred to in Article 40(l)(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."

Paragraph 2 provides that the certificate shall be in the standard form in Annex III. Article 43 provides that:

> "1 The law of the Member State of origin shall be applicable to any rectification of the certificate.
>
> 2 No appeal shall lie against the issuing of a certificate pursuant to Article 41(1) ..."

22. Finally, I should refer to Article 47 which provides so far as material that:

> "1 The enforcement procedure is governed by the law of the Member State of enforcement.
>
> 2 Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) ... shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.
>
> In particular, a judgment which has been certified according to Article 41(1) ... cannot be enforced if it is irreconcilable with a subsequent enforceable judgment."

The judgment of Macur J

23. Macur J dealt first with the father's application pursuant to Article 41, next with his application pursuant to Article 21, and then with the question of whether the English court had jurisdiction.

24. In relation to the father's application pursuant to Article 41, Macur J having observed (para [5]) that it was "patently correct" to described the agreement as an "Agreement on the Exercise of Parental Responsibilities", then explained (paras [7]-[8]) why she was dismissing the father's application:

> "The father contends that the agreement as to the joint exercise of parental responsibility and shared care arrangements inevitably incorporates his "rights of access" which facilitate the same. This is a superficially attractive argument. I reject it. Articles 2.9 and 2.10 differentiate between rights of custody and rights of access. Whilst the definition in Article 2.10 could 'accommodate' the father's defined periods of residence as "access", it strains to do so in

> contrast to the definition in Article 2.9 which clearly accords with the expressed intention of the parents. I am not persuaded that the terms of Article 2.7 permit the relevant party to extract the "rights of access" involved in exercise of parental responsibility in order to chose between Sections 1 and 2 as opposed to Section 4 of Chapter III procedure to gain tactical or any advantage, particularly as here the father seeks to exercise the "day to day" parental responsibility bestowed upon the parent with whom the child resides at the time in accordance with paragraph B of the agreement.
>
> I do not read Article 40.2 to be permissive of procedural selection by the father in these circumstances. This view is supported by the Court of Appeal decision in *Re D-F (Children)* [2011] EWCA Civ 963 which differentiated between enforcement procedure applicable to shared residence and contact orders. Mr Armstrong's attempt to distinguish the authority fails. I do not "review" the Judgment of the Portuguese Court as to "substance" in according to it the description afforded to it by the parties and subsequently the court. The description accords with its content. It relates to parental responsibility not access. This contrasts with the case of *Re D-F* (above). However, the principle remains that the Court of Appeal recognised that different procedures for enforcement of Judgment ensued."

25. In relation to the father's application pursuant to Article 21, Macur J (who heard limited oral evidence from both parties on the issue of habitual residence and the circumstances relating to the making of the Portuguese order) had regard to what she called the background circumstances of the case, which she set out at some length. She made a number of findings adverse to the mother. In relation to what happened at the CPCJ on 23 November 2011 (paras [18]-[19]):

> "The mother has claimed disadvantage and lack of understanding by reason of the absence of an independent interpreter. I am satisfied on the basis of her own evidence that whilst she may not have understood the legal implications of the same that she understood the proposal and agreed to a division of L's care not merely between parents but also between England and Portugal.
>
> I am not satisfied that she was coerced into agreeing terms by the words or actions of the CPCJ officer ... and, although I note what would be a highly unusual presence of two police officers during parental negotiations in this jurisdiction albeit that they were attached to a specialised unit concerned with the welfare of minors, I am not satisfied on the evidence that they acted improperly nor directly influenced the outcome of the meeting."

26. In relation to what happened at court on 7 December 2011 (paras [20]-[21]):

> "I do not accept the mother's evidence that the lawyer jointly instructed was a "friend of the [father's] family". I do accept her evidence that his English was limited to making reference to "L of A" in apparent response to learning of the child's name. This has an undoubted ring of truth about it. I do not understand the father to contest this issue. His case is that he interpreted for the mother

> when necessary. As indicated I find that the mother understood the practical effects of the agreement she entered.
>
> I cannot accept the mother's evidence as to the procedure in court which she claims was conducted in her and the father's absence in the face of the certificate in Annex III which says that she was given the opportunity to be heard ... Whatismore, the mother's signature is clearly appended to the Court document."

27. As against that, Macur J made this finding in favour of the mother (para [26]):

> "Whilst initially entirely cynical of the mother's motives at the time of entering into the agreement with the father I conclude that her intention to renege upon the agreement was not formulated until after her return to this jurisdiction when the traumatic events post 14 November 2011 were behind her. I find that it was the impending date for L's return to Portugal and the father reasonably indicating that he wished to make necessary arrangements to facilitate this which galvanised her into making application to the Courts in this jurisdiction on 7 February 2012."

28. The mother relied upon Articles 23(a), (d) and (e) as grounds for non-recognition of the order. Macur J ruled against her in relation to Articles 23(d) and (e) but found in her favour on the basis of Article 23(a).

29. In relation to Article 23(a) the essence of the mother's argument was that the agreed arrangements for the child were so contrary to his welfare having particular regard to his chronological age that recognition of the homologated order would be manifestly contrary to public policy taking into account the best interests of the child.

30. Macur J treated the decision of Holman J in *Re S (Brussels II: Best Interests of Child) (No 1)* [2003] EWHC 2115 (Fam), [2004] 1 FLR 571, as being the touch stone. From it she derived the principle (para [29]) that "the case where welfare considerations may be legitimately entertained without undermining the principle of Article 26 and so manifestly offend public policy will be extremely rare." Allowing that "public policy" must encompass the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union or by the European Convention for the Protection of Human Rights and Fundamental Freedoms, she said that the speech of Baroness Hale and Lord Wilson in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, para [18], makes clear that "if the court faithfully applies [the provisions of BIIR] that it too will be complying with Art 3 (1) of the UNCRC". In these circumstances, she continued (para [30]), she could not accept the argument that these principles will impact in BIIR cases concerning recognition and enforcement, nor, she said, should it lead to a different reading of *Re S.*

31. In relation to Article 23(a), Macur J rejected much of the mother's case (paras [31]- [33]):

> "I would not have ratified this agreement at first instance. I would not consider it to be in the best interests of an infant child to become a shuttlecock during his early and crucial age of emotional development. That said, I am unable to conclude that the overall situation envisaged would be so obviously and extremely abusive to qualify as the exceptional case.
>
> There is certainly nothing contrary to public policy, let alone manifestly so, in encouraging the mediation of parental disputes as

> occurred here. In the vast majority of cases, as I indicated during the course of argument, a court is entitled to presume that adult parents of full capacity and apparent equal status will reach a conclusion which they regard to best reflect the welfare interests of their child.
>
> The additional argument of the mother utilised in support of Article 23(a) exception is the fact that she was not of equal status by virtue of her linguistic difficulties and thereby was not given the "opportunity to be heard" as per 23(d). Having regard to the available evidence I have already concluded that whatever the situation concerning interpretation or translation the mother was aware of the exact terms of agreement to which she subscribed."

32. But although the mother's case based on Article 23(d) failed, in the final analysis her case based on Article 23(a) succeeded, for reasons which Macur J explained as follows (para [34]):

> "Her mental/emotional health at the time gives me far more reason to concern myself as to her ostensible consent to the arrangement, or the ability to make any dissent known. I bear in mind that parental agreement was seen as key to the CPCJ officer ... and the caveat expressed by the Assistant Scrivener ... and in the circumstances of this particular case, I have tentatively but no less certainly decided that, without any review of the substance of the Judgment, it would be manifestly contrary to public policy to recognise this Judgment pursuant to Article 23(a) of the Regulations."

That, as I read her judgment, has to be read in the light of certain other findings that Macur J had made (paras [22]-[23]):

> "most telling to me is the mother's evidence that she would "have sold her soul to the devil" to exit Portugal. I found this evidence compelling as to her state of mind at the time. It suggests desperation and despair. Observing the mother closely during this part of her oral evidence I was satisfied that it was not a contrived expression used to manipulate the present proceedings. Equally, I was satisfied that she was not capable at the time of entering into the agreement to have already formulated the intention to breach it.
>
> This evidence does not stand alone. I am satisfied on the evidence of the mother and father that whilst in Portugal she was "down" and prescribed anti-anxiety drugs. The father and his mother were sufficiently concerned for her welfare to seek medical attention for her."

33. Having thus dismissed the father's applications pursuant to BIIR, Macur J then turned to consider whether the English court had jurisdiction. Her starting point (para [39]) was, correctly, that L was habitually resident in Portugal at the time of the making of the order in December 2011 and that in any event the Portuguese court was rightly seized of the matter in accordance with Article 12.3. She was also satisfied beyond any doubt, she said (para [25]), that the mother resumed her previous habitual residence in England at the time of her return in December 2011. She set out her conclusion and reasoning as follows (paras [41]-

[42]):

> "Clearly L cannot be "habitually resident" in two places at once within the meaning of Brussels II(R). The nature of the agreement reached and ratified by the Portuguese court is such whereby the parents apparently concede a constantly changing "habitual residence" for L. The European Union legal
>
> definition of habitual residence is set out in *Mercredi v Chaffee* (Case C-477/10) [2011] 1 FLR 1293. Given his age and understanding he must be deemed to acquire the habitual residence of the parent who is exercising de facto sole parental responsibility at the time. In that the time it is proposed he spends in each jurisdiction is intermittent it is nevertheless of ascertainable regularity.
>
> [The father's counsel] convincingly argues that it could never have been the intention of the parents that the change of habitual residence on a two month rotation would permit the respective jurisdictions of each to operate in the relevant periods. This may be so but is, I find, an effect of the drafting of the agreement. There is no stipulation as to preservation of L's habitual residence in Portugal, as I find it to have been, or that Portugal should have sole jurisdiction to determine parental disagreements."

34. For the sake of completeness I should mention a number of other points considered by Macur J. She rejected the mother's argument based on Article 23(e), saying (para [36]):

> "There is no question but that a prohibited steps order, residence order or the making of L a ward of Court would make the Portuguese order irreconcilable and therefore justify non-recognition (Article 23 (e)). This is obviously dependent upon the court having jurisdiction to do so. Assuming for the point of this argument, that I do ... my obvious disinclination to this step made clear during the course of argument arises from the proximity in time of the Portuguese order and the inevitable and implicit review of the substance of the Judgment to justify the fresh application. I cannot conceive that the aim of Brussels IIR should be able to be thwarted so readily in such circumstances in the absence of other grounds not to recognise and enforce."

35. Her approach to Article 13 is not altogether clear. In one place (para [45]), she said that:

> "Article 13 offers no better solution to the problem raised by the practical effect of the Judgment. Wherever the child happened to be in the cycle of shared care will endow the relevant Member State with jurisdiction."

Later, however (para [48]), she expressed herself as:

> "satisfied that the English courts do have jurisdiction to entertain the mother's applications at least by reason of Article 13".

<u>The issues</u>

36. The father, in his grounds of appeal, challenged the decision on all three of the grounds on which Macur J had ruled against him: enforcement in accordance with Article 41; enforcement in accordance with Article 21 on the basis that Article 23(a) applied; and jurisdiction.

37. The mother, in her respondent's notice, sought to uphold Macur J's decision on various additional grounds which I can summarise as follows: enforcement in accordance with Article 41 should also be refused on the child welfare grounds that Macur J had rejected and on the basis that the prohibited steps order made by Macur J was an "irreconcilable judgment" within the meaning of Article 47.2; enforcement in accordance with Article 21 should also be refused for the same reasons, namely on the child welfare grounds that Macur J had rejected and on the basis that the prohibited steps order made by Macur J was an "irreconcilable judgment" within the meaning of Article 23(e).

38. Having read his skeleton argument and heard supplementary oral submissions from Mr Richard Harrison QC on behalf of the father we refused him permission to appeal in relation to the Article 41 issue: *Re L* [2012] EWCA Civ XXXX. We gave him permission to appeal on the other grounds and proceeded to hear the appeal.

39. At the end of the hearing we announced that we had decided to allow the appeal, for reasons which we would hand down in due course. This we now do.

40. It will be convenient to deal with the issues raised before us in the same order as they were dealt with by Macur J.

Issue (1) - Article 41

41. Given that we have already explained why we refused permission to appeal on this issue, I can deal with the matter briefly. Mr Harrison's argument came down to this: that Macur J was bound by the Annexe III certificate and that in refusing to enforce the agreement in accordance with Article 41 she was impermissibly doing the very thing that the Court of Justice of the European Union has emphasised she must not do. In support of this he relied on the decisions of the CJEU in *Re Rinau (Case C-195/08 PPU)* [2008] 2 FLR 1495, *Povse v Alpago (Case C-211/10)* [2010] 2 FLR 1343, and *Zarraga v Pelz (Case C-491/10 PPU)* (2010) to the effect that the court of the Member State of enforcement cannot review or go behind the certificate issued by the court of the Member State of origin even if the judgment of the latter court is vitiated by a serious infringement of fundamental rights.

42. I do not of course question the jurisprudence of the CJEU. The fact, however, is that Macur J was quite plainly neither reviewing nor seeking to go behind the Article III certificate. The contrary is simply not arguable.

43. The agreement homologated by the Portuguese court fell into three parts: clauses A and B relate to "parental responsibility" within the meaning of Article 2.7; clauses C, D and E relate to "rights of custody" within the meaning of Article 2.9; clause F relates to "rights of access" within the meaning of Article 2.10. It follows that whereas clause F could in principle be enforced in accordance with Article 41, clauses C, D and E (which as I have already pointed out were the basis of the father's application under Article 41) could be enforced only in accordance with Article 21. It follows that Macur J was plainly right to reject the father's application.

44. I add two observations. First, there is nothing in BIIR or in the jurisprudence of the CJEU to prevent the judge who is faced with an application in accordance with Article 41 from examining the certified order in order to identify those parts of the order which do and those parts which do not relate to "rights of access" as defined in Article 2.10. Plainly the

judge must do so, otherwise the BIIR scheme becomes unworkable in those cases where, as here (and the present case is far from unique) a single order relates both to "rights of access" and to "rights of custody". Second, there is in the present case, as one might expect, no conflict between the Annexe III certificate issued by the Portuguese court and the agreement thus certified. The certificate does not assert that clause C relates to "rights of access". It is only the father who, as we have seen, seeks impermissibly to characterise clause C in that way.

Issue (2) - Article 21

45. The scheme of this part of BIIR is very clear. Articles 26 and 31.3 provide that "Under no circumstances" may the judgment of the court of the Member State of origin "be reviewed as to its substance" by the court of the Member State of enforcement. Article 23(a) on the other hand prohibits recognition "if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child."

46. Article 23(a), in my judgment, contains a very narrow exception and, consistently with the entire scheme of BIIR and with the underlying philosophy spelt out in Recital (21), sets the bar very high.

47. I can start with *Bamberski v Krombach (Case C-7/98)* [2001] Q.B. 709, where the CJEU had to consider Article 27(1) of the original Brussels Convention ("BI"), which provides: "A judgment shall not be recognised ... if such recognition is contrary to public policy in the state in which recognition is sought." It will be noticed that this differs in two respects from Article 23(a) of BIIR: it does not contain the word "manifestly" which in BIIR appears immediately before the word "contrary", nor, unsurprisingly given the subject matter of BI, does it contain the concluding words "taking into account the best interests of the child."

48. Two short passages from the judgment of the CJEU suffice for present purposes. In the first (para [21], citations omitted) the court said:

> "So far as article 27 of the Convention is concerned, the court has held that that provision must be interpreted strictly in as much as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention ... With regard, more specifically, to recourse to the public-policy clause in article 27(1), the court has made it clear that such recourse is to be had only in exceptional cases".

The court continued (para [37]):

> "Recourse to the public policy clause in article 27(1) of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another contracting state would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought in as much as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order."

The court made clear (paras [39], [44]) that a "manifest" breach in relation to one of the "fundamental elements in a fair trial", in that instance the refusal to hear the defence of a person in his absence, could bring a case within Article 27(1).

49. In *Re S (Brussels II: Recognition: Best Interests of Child) (No 1)* [2003] EWHC 2115 (Fam), [2004] 1 FLR 571, Holman J had to consider Article 15(2)(a) of BIIR's predecessor, commonly referred to as BII,[2] which was in the same terms as Article 23(a) of BIIR. The issue arose in that case because, as Holman J said (para [29]), he would not himself have made an order in the terms of the order recognition of which was being sought. Correctly, in my judgment, Holman J referred to the decision in *Krombach*, notwithstanding the differences in the language of the two provisions. He expressed himself as follows (para [32]):

> "It seems to me that, in applying Art 15(2)(a), I have to give proper weight and effect to the language that is used. The Article does not refer simply to recognition being contrary to the best interests of the child. It refers, rather, to recognition being contrary to public policy, taking into account the best interests of the child. Merely to reconsider the best interests of the child would be to review the Belgian judgment (which is clearly welfare based) as to its substance, which is forbidden by Art 19. I have to take into account the best interests of M, but ultimately to consider whether recognition is manifestly contrary to English public policy. To say that something is contrary to public policy is a high hurdle, to which the Article adds the word 'manifestly'. This is an international convention and I must apply it purposively, giving appropriate weight to the word manifestly."

He continued (para [33]):

> "... it is possible to contemplate a situation in which an order of a foreign court is so strongly contrary to the welfare of the child concerned that it would be possible to conclude that its
>
> recognition was manifestly contrary to the public policy of our State. But, in my judgment, this order in relation to M falls far short of that. I have frankly said that in my view it is not an order which was in his best interests, but I am quite unable to conclude that it is so contrary to his best interests that it would be actually contrary, let alone manifestly contrary, to some English principle of public policy to enforce it."

50. Holman J's approach has been followed by other first instance judges, most recently by Roderic Wood J in *LAB v KB (Abduction: Brussels II Revised)* [2009] EWHC 2243 (Fam), [2010] 2 FLR 1664, who however added this important gloss (para [32]):

> "I would venture the comment that whilst Holman J accepted that there might be circumstances where the 'order of a foreign court is so strongly contrary to the welfare of the child that its recognition was manifestly contrary to the public policy of our state' I consider that such cases would be extremely rare, and that the consequences

[2] Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses.

> for the children of recognition and enforcement, though these are separate stages from each other, would have to be of the utmost seriousness. I do not consider it necessary, appropriate or wise to attempt to give examples."

51. Roderic Wood J also quoted with approval (para [34]) some observations of Singer J in W v *W (Residence: Enforcement of Order)* [2005] EWHC 1811 (Fam), [2005] All ER (D) 41 (Aug). First (para [40]) that:

> "A high onus rests upon a parent who seeks to reopen welfare issues ... the policy must be save in the most exceptional of circumstances not to allow the foreign judgment to be subverted."

Second (para [50]) that:

> '"The use of the word "manifestly" connotes a very high degree of disparity between the order's effects if now enforced and the child's current welfare interests".

52. I respectfully endorse the passages which I have quoted from Holman J's judgment in *Re S* as correctly setting out the proper approach to be followed in cases where Article 23(a) is relied upon, subject only to the gloss, which I would also endorse, provided by Roderic Wood J in the passage I have quoted from his judgment in *LAB.* The test is stringent, the bar, as I have said, is set high. Singer J's observations in *W v W* helpfully capture just how high.

53. It follows, in my judgment, that Macur J was right to follow the approach mapped out by Holman J just as she was right - indeed in my judgment plainly and obviously right - to find that the arguments based on L's welfare did not suffice to bring the case within Article 23(a). Like Holman J in the earlier case, Macur J was faced with an application for enforcement of an order which she herself would not have made. And she explained why. But, as she properly held, she was unable to conclude that the situation was "so obviously and extremely abusive to qualify as the exceptional case." She was plainly entitled to come to that view and in expressing herself as she did she was not, in my judgment, setting the bar too high. The simple fact, when all is said and done, is that this case, insofar as it is based on L's welfare, falls far short of what is required to bring Article 23(a) into play.

54. If Macur J was accordingly right to reject that part of the mother's case based upon considerations of L's welfare, she was, in my judgment, wrong to find that the test in Article 23(a) was met by virtue of the mother's mental or emotional state.

55. Although the circumstances said to being Article 23(a) into play have to be evaluated "taking into account the best interests of the child", one can envisage circumstances in which Article 23(a) could apply if, for example, there had been a manifest failure to comply with some fundamental principle of procedure resulting in an egregiously unfair trial. In that sense there can in principle be an overlap between Article 23(a) on the one hand and Articles 23(b) and (d) on the other. So far so good. Let it also be assumed, as I am content to assume, that Macur J's factual findings in relation to the mother as I have set them out above were securely founded in evidence she was entitled to accept.

56. None of that, however, begins to make good the proposition that Macur J was justified on the basis of those findings in concluding that the case fell within Article 23(a). With all respect to Macur J I simply fail to see how, in the circumstances as she has found them, it could be manifestly contrary to public policy to recognise the judgment of the Portuguese court. On the contrary, to take this course is, in truth, to embark, impermissibly and in

breach of Article 26, upon a review as to its substance. Accepting, as I do, that manifest breaches of fundamental principles of procedural fairness can in principle engage Article 23(a), the fact is that this case, insofar as it is based on the mother's complaints about the process in Portugal or on the state of her emotional and mental health, falls far short of what is required to bring Article 23(a) into play.

57. In my judgment, the father succeeds in his appeal in relation to Article 23(a).

58. Macur J's judgment rejecting the mother's case based on Article 23(d) has not been challenged before us. I need say no more than that she was, in my judgment, plainly entitled to decide as she did and for the reasons she gave.

59. Mr Marcus Scott-Manderson QC on behalf of the mother challenged Macur J's rejection of the mother's case based on Article 23(e). His challenge, with all respect to him, is little short of hopeless. The prohibited steps order put in place by Macur J, like the earlier prohibited steps order made by the District Judge, was part of a temporary regime put in place to 'hold the ring' on an interim basis pending final determination of the issues arising under BIIR. Such an interim measure is not an "irreconcilable" judgment within the meaning of either Article 23(e) or Article 47: see for example the decision of the CJEU in *Povse* v *Alpago (Case C-211/10)* [2010] 2 FLR 1343, para [79], to the effect that a provisional or interim order even if enforceable under the law of the Member State of enforcement cannot preclude enforcement of a certified judgment delivered previously by a court in the Member State of origin.

60. Mr Scott-Manderson seeks to escape from this view of Article 23(a), just as he submits that Holman J's analysis in *Re S* needs to be modified, by mounting an ingenious if subtle argument which however, in common with Macur J, I have no hesitation in rejecting.

61. Mr Scott-Manderson takes as his starting point the principle, well established in the jurisprudence of the European Court of Human Rights, that a parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development: see, for example, *Scozzari and Giunta v Italy* (2000) 35 EHRR 12, [2000] 2 FLR 771, *Gnahore v France* (2002) 34 EHRR 967, *Raban v Romania* (2010) and *Plaza* v *Poland* (2011) and the recent discussion of this court in *Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521 [2011] 2 FLR 912. He then seeks to build a bridge or connection between the Convention and BIIR, and between the jurisprudence of the ECtHR and the jurisprudence of the CJEU, by pointing to two things: first, the reference in Recital (33) to the "the principles of the Charter of Fundamental Rights of the European Union" and, second, the discussion by the CJEU in *JMcB v LE (Case C-400/10)* [2011] 1 FLR 548, paras [53], [60], of the inter-relationship between Article 8 of the Convention and its counterpart in Article 7 of the Charter, and its recognition of the need to construe Article 7 in accordance with the Article 8 jurisprudence of the ECtHR. He points in particular to what the CJEU said (para [60]) to the effect that the provisions of BIIR:

> "cannot be interpreted in such a way that they disregard that fundamental right of the child [as set out in Article 24 of the Charter], the respect for which undeniably merges into the best interests of the child."

He proceeds finally to assert that this is precisely what would follow in the present case if the order of the Portuguese court is recognised despite Macur J's finding that it is not in L's best interests.

62. I accept, of course, what the CJEU has said, but I cannot with all respect to Mr Scott-Manderson accept that it takes him where he would have us go. Plainly, in deciding what

order to make, the court of the Member State of origin must ensure that it complies with Article 8 of the Convention and Articles 7 and 24 of the Charter. But the duty of the court of the Member State of enforcement is to comply with BIIR, which is premised upon the principle of mutual trust referred to in Recital (21) and upon the assumption that the court of the Member State of origin will in all probability have complied with its duties under the Convention and the Charter; which provides very limited grounds for non-recognition; and which in Article 23(a) deliberately sets the bar very high. Procedure under BIIR is intended to be summary though never arbitrary or mechanical. As the Supreme Court said in *In re E*, para [18], BIIR has been devised with the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration. To accept Mr Scott-Manderson's argument would be to drive a coach and four through the BIIR procedure and go far to depriving Articles 26 and 31.3 of their intended effect. In my judgment, if the court of the Member State of enforcement faithfully applies the relevant provisions of BIIR in accordance with the established jurisprudence, there will be no breach of either the Charter or the Convention. The approach of Holman J in *Re S* requires no modification or adjustment of the kind suggested by Mr Scott-Manderson.

63. Before leaving this part of the case I add one final observation. Mr Harrison was not aware of, and Mr Scott-Manderson was not able to point us to, any decision, whether in this county or elsewhere, where an argument based on Article 23(a) has succeeded. This is unsurprising given what can be expected of any court operating within the BIIR system. The best that Mr Scott-Manderson could do was to take us to the very recent decision of the ECtHR in *M and S* v *Italy and the United Kingdom* (2012). In that case an order had been made in Italy and recognition in this country was sought in accordance with Article 21 of BIIR. The mother's attempt to rely upon Article 23(a) was rejected both by the High Court and subsequently by this court. The mother's subsequent application to the ECtHR claiming that the decisions of the English courts breached both her and the child's rights under Article 8 of the Convention was rejected as manifestly ill-founded. This demonstrates that the decision under BIIR of a court of the Member State of enforcement is in principle amenable to challenge both in the CJEU and in the ECtHR but it hardly assists the mother in the present case.

Issue (3) - Jurisdiction

64. In accordance with Article 8.1, whether or not the English court has jurisdiction depends upon whether L was "habitually resident" in England when the proceedings were commenced in the Oxford County Court on 7 February 2012. Macur J held that he was. In my judgment he was not; he was still habitually resident in Portugal.

65. In this country the question of what is meant by "habitual residence" for the purposes of BIIR first arose in the context not of Article 8 but of Article 3, which deals with jurisdiction in matters relating to divorce, legal separation or marriage annulment. At that time there had been no decision of the CJEU in relation to the meaning of "habitual residence" for the purposes of BIIR though there was an extensive jurisprudence of the CJEU analysing the meaning of habitual residence in a number of other EU contexts.

66. In relation to Article 3 the meaning of habitual residence has been considered in a line of authorities at first instance: *L-K v K (No 2)* [2006] EWHC 3280 (Fam), [2007] 2 FLR 729 (Singer J), *Marinos v Marinos* [2007] EWHC 2047 (Fam), [2007] 2 FLR 1018 (Munby J), *Munro v Munro* [2007] EWHC 3315 (Fam), [2008] 1 FLR 1613 (Bennett J), Z v Z *(Divorce: Jurisdiction)* [2009] EWHC 2626 (Fam), [2010] 1 FLR 694 (Ryder J), and V v *V (Divorce: Jurisdiction)* [2011] EWHC 1190 (Fam), [2011] 2 FLR 778 (Peter Jackson J).

67. So far as material for present purposes these authorities demonstrate two things: first, that

'habitual residence' has an autonomous meaning in EU law, and that its meaning in EU law is not the same as its meaning in our domestic law; second, that, in distinction to our domestic law (contrast *Ikimi* v *Ikimi* [2001] EWCA Civ 873, [2002] Fam 72), at any given time a person can have only one habitual residence for the purposes of BIIR. Those two propositions have never been doubted. They are in my judgment good law and, moreover, just as applicable in relation to Article 8 as in relation to Article 3.

68. The CJEU first had to consider the meaning of "habitual residence" in the context of Article 8 in *Re A (Area of Freedom, Security and Justice) (Case C-523/07)* [2009] 2 FLR 1. It laid down three important principles. First (para [36]) that:

> "The case-law of the court relating to the concept of habitual residence in other areas of European Union law ...cannot be directly transposed in the context of the assessment of the habitual residence of children for the purposes of Art 8(1) of the regulation."

Second (para [37]) that:

> "The 'habitual residence' of a child, within the meaning of Art 8(1) of the regulation, must be established on the basis of all the circumstances specific to each individual case."

Third (paras [38]-[39]) that:

> "In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.
>
> In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration."

The CJEU summarised this in a passage (para [44]) which there is no need for me to set out.

69. Given the circumstances of the present case, it is interesting to note the CJEU's comment (para [41]) that:

> "the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that State."

70. What the CJEU had said in *Re A* was reiterated by it in *Mercredi* v *Chaffe (Case C- 497/10)* [2011] 1 FLR 1293. Having observed (para [44]) that it "follows from the use of the adjective 'habitual' that the residence must have a certain permanence or regularity," the CJEU continued (paras [47], [49]-[51], citations omitted):

> "To ensure that the best interests of the child are given the utmost consideration, the ... concept of 'habitual residence' under Art 8(1) of the Regulation corresponds to the place which reflects some degree of integration by the child in a social and family environment...

> ... in order to determine where a child is habitually resident, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent.
>
> ... the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence.
>
> In ... order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character …"

71. The CJEU added (paras [53]-[54]):

> "The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.
>
> As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of."

The CJEU then proceeded to elaborate this last point in a passage (paras [55]-[56]) which there is no need for me to set out but which requires to be read in the context of the particular circumstances in *Mercredi,* a case where, in contrast to the present case, the mother alone had parental responsibility for the child.

72. Disputes about habitual residence can arise in many different factual contexts. Sometimes the issue may arise, as in *Mercredi,* in the context of a re-location from one Member State to another. Sometimes, as in *Marinos,* the issue may arise because someone has a house in more than one Member State. It is not difficult to imagine other cases which if more extreme are not altogether fanciful. What of the mega-rich 'citizen of the world' ceaselessly on the move between the houses he owns in a number of different countries, the houses of his friends in various countries and the most luxurious hotels in various fashionable resorts around the globe. And what of the perpetual nomad who, having cut his previous ties, has spent the last ten years pedalling his bicycle around the world or sailing his yacht across the oceans.

73. For present purposes there is no need to pursue these speculations, but I should look briefly at two authorities to which Mr Harrison directed our attention. Neither, I should add, relates to BIIR. The first is the decision of Douglas Brown J in *Re V (Abduction: Habitual*

Residence) [1995] 2 FLR 992, where a married couple lived during the tourist season in a villa in Corfu and over the winter in a house in London. It was argued by the mother that there was concurrent habitual residence in both this country and Greece; by the father that there was either a single habitual residence (on the facts in Corfu) or, alternatively, an alternating, or consecutive, habitual residence changing twice a year. Douglas Brown J found for the mother, saying (page 1002):

> "In my view there is ... a sufficient degree of continuity in the residence in London for habitual residence on the part of the parents to arise and an equally sufficient degree of continuity in their residence in Corfu for the same result to arise. Therefore for part of the year the parents and the children were habitually resident in London and for the remainder of the year habitually resident in Greece."

The analysis and the outcome are reminiscent of the case postulated by Lord Warrington of Clyffe in one of the old taxation cases, *Levene v Commissioners of Revenue* [1928] AC 217, 232,

> "A member of this House may well be said to be ordinarily resident in London during the Parliamentary session and in the country during the recess."

74. The other case is *Ikimi* v *Ikimi* [2001] EWCA Civ 873, [2002] Fam 72, where the family had houses in both Nigeria and London. For present purposes the only relevance of the case is the comment that my Lord, Thorpe LJ, made (para [32]) about *Re V:*

> "the adoption of the concept of alternating habitual residence adopted by Douglas Brown J in the case of *Re V (A Minor) (Abduction: Habitual Residence)* [1995] 2 FLR 992 seems to me to be reflective of the facts of the particular case. The family that spends 6 continuous months in one home and 6 continuous months in another will be rare. The concept breaks down in the instance of the family moving between two jurisdictions on a weekly basis."

75. In the present case, given the principle that at any given time a person can have only one habitual residence for the purposes of BIIR, there are only three possibilities: first, as the father contends, that L remains habitually resident in Portugal; second, as the mother contends and as Macur J found, that L's habitual residence alternates between Portugal and England on a two-monthly cycle; third, as the mother contends in the alternative, that L's habitual residence cannot be established, with the consequence that the English court has jurisdiction in accordance with Article 13.

76. This last alternative can be rejected at the outset. The facts here are far removed from the kind of case in which Article 13 might apply. It will be an exceptional case in which Article 13 applies: see *Re A* para [43] and *Mercredi* para [57]. This case if unusual does not come within the exceptional category in which Article 13 might apply. The choice therefore lies between the first two alternatives.

77. The starting point is that down to the time when L left Portugal with his mother on 18 December 2011 he was undoubtedly habitually resident in Portugal. So much, indeed, was accepted by Mr Scott-Manderson. What is equally clear is that thereafter his parents, both of whom it is important to note have parental responsibility for him, were habitually resident in different countries: his mother in England and his father in Portugal. So in this case the habitual residence of the parents at the relevant date - 7 February 2012 -provides

no assistance in determining where L was habitually resident.

78. Given that L was habitually resident in Portugal on 18 December 2011, and given that his mother's subsequent acquisition of an English habitual residence is really neither here nor there, the question seems to me to reduce itself to this: Having regard to the principles laid down by the CJEU in *Re A* and in *Mercredi*, did L's arrival in this country in accordance with clause C of the agreement for the purpose of living here with his mother for two months have the effect of changing his habitual residence? In my judgment, and with all respect to Macur J who took a different view, the answer can only be No.

79. What the CJEU jurisprudence establishes is that "physical presence" is not enough. The child's residence must have a "certain permanence or regularity", it must as a general rule "have a certain duration which reflects an adequate degree of permanence", it must "reflect some degree of integration in a social and family environment", rather than being "temporary or intermittent". In my judgment L's presence - residence - in England on a constantly revolving two-monthly cycle lacks the necessary degree of permanence. The cycle, if regular, nonetheless provides for presence - residence - which on each occasion is only temporary and intermittent. That is enough to decide the point but I should add that the alternative view, although it commended itself to Macur J, would have practical consequences hardly conducive to the smooth working of BIIR in the manner contemplated by its architects.

80. *In V v V (Divorce: Jurisdiction)* [2011] EWHC 1190 (Fam), [2011] 2 FLR 778, a case under Article 3, Peter Jackson J was pressed with the argument that although it is possible to have more than one residence between which one alternates, one cannot have more than one residence simultaneously. Commenting on this he said (para [52]):

> "I have no difficulty with the concept of a person being resident in more than one place at a time. It is a description that applies aptly to a number of situations - the family with more than one main home, the person who spends extended periods away at an established place of work. Such a person is of course only present in one place at a time, but the relevant concept is residence and not presence. *It makes no sense to regard a person who travels between two homes on a regular and frequent basis as oscillating in perpetual succession between being resident at one and then at the other* (emphasis added)."

If this is so in the case of residence, then surely all the more so in the case of habitual residence. L's perpetual oscillation between Portugal and England is simply inconsistent with his acquisition of habitual residence in the latter.

81. In my judgment the father's appeal on this point must be allowed.

Conclusion

82. It follows, in my judgment, that the father's appeal must be allowed on both of the grounds for which we gave him permission to appeal. The Portuguese order should be recognised in accordance with Article 21. L remains habitually resident in Portugal. The English court does not have jurisdiction. In accordance with BIIR it is the Portuguese court alone that has jurisdiction.

Sir Stephen Sedley :

83. I agree.

Lord Justice Thorpe:

84. I have had the advantage of reading in draft the judgment of my Lord, Munby LJ, and I am in complete agreement with his reasoning.

85. At first sight this appears to be a complex appeal but in reality there are but two points. First, was the judge entitled on the evidence to find that:-

> "It would be manifestly contrary to public policy to recognise this Judgment pursuant to Article 23(a) of the regulations."

The second is whether the judge correctly held in relation to the arrangement for the child's pendulum movements between England and Portugal that:-

> "Wherever the child happened to be in the cycle of shared care will endow the relevant Member State with jurisdiction."

To that conclusion the judge added:-

> "I am satisfied that the English courts do have jurisdiction to entertain the mother's applications at least by reason of Article 13 and that it is prima facie in the best interests of the child now to conduct proceedings here."

86. As to the first point my Lord's judgment demonstrates that the conclusion is unsustainable on the evidence. I would only add that the absence of any reported case known to the specialist bar briefed on this appeal, in which recognition of an apparently valid judgment has been refused on the grounds of public policy, is a fair indication of the exceptional nature of such a finding. The arrangement agreed between the mother's family and the father's family had at least the merit of consensus. It was not only approved by the Judge but it resulted from the intervention and support of local child protection services. To label a Portuguese order with such foundations contrary to the public policy of this jurisdiction would be to disregard the over-arching objectives of the Regulation expressed in its first two Recitals. Particularly is that so when the order in question was not a judicial determination but only a judicial endorsement of a mediated agreement.

87. The judge's conclusion on the second issue, the issue of habitual residence, is unsound both theoretically and practically. Chaos would result were the responsibility to take welfare decisions in relation to the child to switch from one jurisdiction to another every 56 days.

88. The scheme of the Regulation for jurisdiction in cases of parental responsibility is clearly constructed: Article 8 provides the general rule and Articles 9-15 provide for exceptional circumstances. The judge rightly held that L was habitually resident in Portugal preceding and at the date of the order of 7 December 2011. The arrangement made between the parties did not envisage or result in a transfer of jurisdiction to England. Plainly if the order of 7 December 2011 did not stand the test of usage, or if the parents were in dispute as to the detail of its implementation, the Portuguese court was the proper court to determine such issues.

89. The judge's claimed jurisdiction under Article 13 equally fails to give proper weight to the general rule. Cases in which a child's habitual residence cannot be established will be rare. Furthermore the exercise of a presence jurisdiction would create the same problem as the judge's first choice of oscillating jurisdictions.

90. It would have been better had the legal issues been addressed and decided without oral evidence. I have no doubt that the judge felt an understandable sympathy for the mother. An

indication of that is given by her conclusion that it was in the child's best interests to conduct proceedings here. However that is not the test and the introduction of such a discretion would jeopardise the scheme of the Regulation. As I look at this case without that influence I would say that this mother threw over the agreed arrangements only 7 weeks after their commencement. If she repented of her agreement or if she conceived that in practice it was inconsistent with the welfare of the child, then as a matter of principle her obligation was to apply to the Portuguese Court. The issue of competing proceedings in this jurisdiction was plainly strategic and that strategy has succeeded to the extent that it has gained her 6 months of respite.