Neutral Citation Number: [2009] EWCA Civ 993
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
PRINCIPAL REGISTRY, FAMILY DIVISION
(MRS JUSTICE MACUR)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 16th June 2009

Before:

LORD JUSTICE THORPE
and
LORD JUSTICE WALL

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IN THE MATTER OF S (A Child)

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Mr C Howard QC and **Ms T Gupta** (instructed by Messrs Dawson Cornwell) appeared on behalf of the **Appellant** mother.

Mr M Nicholls QC and **Ms I Ramsahoye** (instructed by Messrs Kingsley Napley) appeared on behalf of the **Respondent** father.

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Judgment

Lord Justice Thorpe:

1. This appeal arises out of proceedings before the Court of First Instance in Milan which resulted in an order, the summary of which I take from the skeleton argument of Mr Michael Nicholls QC who is counsel for the respondent to the appeal. The Court of First Instance directed that the custody of S, the only child of the parties, be assigned to the Municipality of Milan. The order required the mother to return S immediately to Italy to enable S to be placed in foster care. Alternatively the order provided that the Municipality should arrange for S to be placed with her mother, subject to her election, in a protected environment, to arrange a therapeutic programme and to organise meetings between S and the father.

2. That sad order has of course a family background. The parties met and married. S was conceived as a result of assisted reproductive techniques. The relationship between her parents broke down even before her birth. S has always been in her mother's care. Her mother has become convinced that S has been interfered with sexually by her father. She has not complied with arrangements for contact between S and her father. Accordingly orders for contact have been made within the Italian proceedings, it being common ground that the Italian jurisdiction has priority despite the fact that mother and child are habitually resident in this jurisdiction. So the Italian order must be seen in that context. No doubt the objective of the Italian judge was to achieve a relationship between daughter and father no matter what draconian provisions were necessary to achieve that result.

3. The order was in fact made on 26 January 2009 by the Tribunale Ordinario in Milan. That being an order capable of immediate registration and enforcement under the provisions of the regulation of Brussels II bis, it is perhaps almost inevitable that the father applied in this jurisdiction for permission to register the order. The effect of registration would be to achieve enforcement without *exequatur*, as though it were an order made by a domestic court within this jurisdiction. That application came before Macur J, who on 24 February granted permission for registration pursuant to article 28(2) of the Regulations. By paragraph four of her order, she provided that the mother might seek to appeal, had one month in which so to do and granted a stay until the expiration of the time for filing of mother's notice of appeal.

4. It seems that as further opportunity for the mother to exercise her appellate right the judge ordered that there be a further listing before a judge of the High Court on 17 March with a time estimate of only half an hour. I believe that that provision resulted in a listing before Hedley J, but I will not lengthen this judgment by reference to any order in the Family Division other than that of Charles J of 18 May. By that stage the mother had issued her notice of appeal, not within the Family Division but to this court, and accordingly Charles J surveyed a scene in which the mother was seeking her appellate process in this court and not in the court below. So he made a wise order which was essentially to leave both appellate routes open. He said by paragraph one that the mother's Appellant's Notice should be treated as if filed today within the Principal Registry of the Family Division. He made a

number of other sensible directions and orders, culminating in an order that the mother's appeal should be listed before a judge of the Division before the end of the Trinity Term, and we have been informed by counsel that it is in the list for 29 July.

5. The uncertainty as to process grew out of an e-mail that junior counsel then appearing for the mother sent to the senior district judge's clerk in the Principal Registry. Counsel said that he was enclosing the order of Macur J and the subsequent notice of registration. He continued:

> "I would like to know:
>
> 1. the name of the appropriate form to complete in respect of the appeal (including a copy of the form if possible)
> 2. whether the appeal is in respect of paragraph 1 of the High Court Order or the notice of registration
> 3. to which judge the appeal lies
> 4. what supporting documents would be needed."

We do not have a copy of the response from the senior district judge's clerk but we do know its content from an e-mail that the senior district judge sent to my legal secretary. He ruled:

> "If the defendant wishes to appeal against the order of the High Court judge in relation to registration, the appeal would be from the order giving permission to register; the notice of registration is not itself an order."

So far so good. He continued:

> "An appeal lies to the Court of Appeal and is made by filing an appellant's notice. Permission to appeal is required.
> The procedure and documentation is governed by CPR Part 52."

6. The direction there is partially correct, it seems to me. No doubt there is no requirement for permission. The right of appeal is contained plainly within the Regulation. But the direction that the appeal should be to this court was not accepted by the mother's solicitor and accordingly by letter of 1 April, a few days after the exchange with the senior district judge's clerk to which I have referred, there came a letter. The letter drew attention to the information relating to courts pursuant to article 68 of the Regulation and the decision of Black J in the reported case of Re: D [2008] 1 FLR 516. I will read into this judgment the relevant articles of the Regulation but suffice it to say that the lists that are appended to article 68 specify which court of individual member states is to take proceedings under articles 21, 29, 33 and 34 of the Regulation. To those lists I will refer in greater detail in due course.

7. The decision of Black J contains one paragraph which is relevant to the issues we decide this morning. It is paragraph 38 and is as follows:

> "Finally on the issue of procedure, I enquired during the hearing why it was thought that I had jurisdiction to entertain an appeal from the decision of another High Court judge. Nobody had been able to find the answer as to the proper appeal route. I presume that an appeal to a High Court judge had been chosen by analogy with the procedure where a litigant seeks to overturn a without notice order and therefore applies, on notice, to the court which made that order. However, the Regulation and the FPR 1991 talk in terms of an 'appeal' and I am not convinced that this analogy is appropriate. Article 68 of the Regulation provides that member states are to notify the Commission of the lists of courts responsible for certain procedures under the Regulation and art 33 provides that an appeal against a decision on an application for a declaration of enforceability must be lodged with the court appearing on the list. Counsel had not been able to obtain information about the courts listed by the UK. I have proceeded to deal with the appeal de bene esse, therefore. It has subsequently been confirmed that I was right to do so and the appeal was properly directed to the High Court."

8. My legal secretary had referred to me the exchanges between junior counsel and the senior registrar's clerk and I had decided to support the line taken by the senior district judge. But of course the submission of the lists and of the decision in Re: D by the mother's solicitor required a reconsideration of the provisional view that we had taken. Accordingly I copied the letter and its enclosures to the senior district judge and asked him to clarify with Black J what was the subsequent confirmation that she had received that indicated that the appeal was to her court. Unfortunately the senior district judge has not been able in the interim to discuss with Black J what she relied upon, and it falls to us to decide authoritatively what are the proper procedural steps to take where there is an application for permission to register, where there is a first appeal against registration and perhaps where there is a second appeal against registration.

9. We have received skeleton arguments from both Mr Charles Howard QC and from Mr Michael Nicholls QC. The issue is succinctly summarised by Mr Nicholls at the outset of his skeleton argument. He summarised the effect of Mr Howard's skeleton thus:

> "(a) The Court of Appeal can decide the mother's appeal;

> "(b) The mother's appeal ought to be allowed and the matter remitted for hearing before a judge of the division; and
>
> "(c) The mother does not require permission to appeal."

Mr Nicholls then summarised the father's position thus:

> "(a) An appeal under article 33 against registration of such a judgment for the purposes of the enforcement under article 28 must be directed to the Family Division of the High Court;
>
> "(b) No permission to appeal is required;
>
> "(c) However if there is a further appeal under article 34 to the Court of Appeal permission to appeal might be required; and
>
> "(d) No further appeal is permissible beyond that provided for under article 34. For example there is no entitlement to appeal to the House of Lords from the Court of Appeal."

10. I am in no doubt that the position taken by Mr Nicholls on behalf of the father is correct in law. An appeal under article 33 against registration must be directed to the Family Division of the High Court. No permission to appeal is required. In relation to a second appeal, that manifestly lies to this court and I would add that clearly permission to appeal would be required. This court excepts from the general provision that permission is required to bring a family appeal very few appeals and all of them relate to liberty of the subject. This type of appeal does not involve liberty of the subject, and plainly permission would be required. I would equally endorse that no further appeal would be permissible beyond that provided for in article 34.

11. In order to express the reasons for my conclusion I would adopt the reasoning advanced by Mr Michael Nicholls in his skeleton argument. The procedure is clearly regulated by articles 30 to 35 inclusive, and I set them out in this judgment verbatim:

> "**Article 30**
> Procedure
>
> 1 The procedure for making the application shall be governed by the law of the Member State of enforcement.
> 2 The applicant must give an address for service within the area of jurisdiction of the court applied

to. However, if the law of the Member State of enforcement does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.
3 The documents referred to in Articles 37 and 39 shall be attached to the application.

Article 31
Decision of the court

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.

Article 32
Notice of the decision

The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure laid down by the law of the Member State of enforcement.

Article 33
Appeal against the decision

1 The decision on the application for a declaration of enforceability may be appealed against by either party.
2 The appeal shall be lodged with the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.
3 The appeal shall be dealt with in accordance with the rules governing procedure in
contradictory matters.
4 If the appeal is brought by the applicant for a declaration of enforceability, the party against whom enforcement is sought shall be summoned to appear before the appellate court. If such person fails to appear, the provisions of Article 18 shall apply.
5 An appeal against a declaration of enforceability must be lodged within one month of service thereof. If the party against whom enforcement is sought is

habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Article 34
Courts of appeal and means of contest

The judgment given on appeal may be contested only by the proceedings referred to in the list notified by each Member State to the Commission pursuant to Article 68.

Article 35
Stay of proceedings

1 The court with which the appeal is lodged under Articles 33 or 34 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged in the Member State of origin, or if the time for such appeal has not yet expired. In the latter case, the court may specify the time within which an appeal is to be lodged.
2 Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1."

I only add to that article 68:

"**Article 68**
Information relating to courts and redress procedures

The Member States shall notify to the Commission the lists of courts and redress procedures referred to in Articles 21, 29, 33 and 34 and any amendments thereto.

The Commission shall update this information and make it publicly available through the publication in the Official Journal of the European Union and any other appropriate means."

12. What, then, is the effect of these provisions? The first application for permission to register is brought under article 29(1) and it is a without notice application. It is essentially administrative, although it requires a judicial act.

The judicial officer has only to check that the order of the foreign court is apt on its face and that the application falls within the general provisions of the regulation. It is very clearly stated within the regulation itself, particularly article 31, that the application for registration can only be refused for one of the reasons specified in articles 22 to 24 and that under no circumstances may a judgment be reviewed as to its substance.

13. The court to which that first without notice application must go is plainly provided by the lists appended to article 68. Applications under article 29 shall be submitted to the various courts that appear in this list and for the United Kingdom "in England and Wales, the High Court of Justice -- Principal Registry of the Family Division".

14. Once an order has been made for permission to register, as we have seen in this case, the respondent has a month within which to appeal. That right is provided by article 33. Now article 68 by list 2 specifies the court at which an article 33 appeal shall be lodged, and again in relation to the United Kingdom it is "in England and Wales, the High Court of Justice -- Principal Registry of the Family Division".

15. If the respondent fails in that first appeal, article 34 does provide that the refusal may be contested only by proceedings referred to in the list notified pursuant to article 68. List 3 provides that appeals under article 34 may be brought only for England and Wales in the Court of Appeal. The specification of the appropriate court within lists one, two and three is a specification made by the Lord Chancellor on behalf of the Executive. It therefore seems to me as a matter of principle that it is not open to this court or any other court to depart from the designations made by the Lord Chancellor that have been incorporated within the lists attached to article 68. We are here concerned with part of the corpus of international family law. We are applying a Brussels Regulation, and any question as to its construction and application is ultimately for the European Court of Justice. We are not applying our internal laws which would be apt for issues concerning the appropriate appellate procedure. It is true that article 31 provides that the procedure for making applications shall be governed by the law of the member state of enforcement and to that extent the Family Proceedings Rules have made certain provisions in this area, but the routes of appeal are in my judgment clearly established by the Regulation itself and it is not open to the domestic court to depart from that designation.

16. However, I would emphasise that the High Court of Justice within its Principal Registry operates at two essential levels within the judicial hierarchy. There are the judges of the Division, supplemented by circuit judges who hold section 9 designations and there are the district judges. Under the provisions of the Rules of the Supreme Court, Order 32, rule 11, a district judge of the Family Division exercises all the jurisdiction of the judge in chambers with certain exceptions that are specifically excluded. Given that the task of the judicial officer who considers an application for permission is essentially administrative, it seems to me plainly to fall within the province of the district judge. That then overcomes the uncomfortable and certainly

counter-intuitive experience of the Family Division judge who finds himself hearing an appeal from another judge of the Division. Plainly the first process of registration, which Mr Nicholls has labelled the unilateral process, should go to a district judge in the Principal Registry. If the respondent, having been served with the registration, appeals, then that is a list 2 appeal and it goes to the same court but to the judge at the higher tier of the hierarchy, one of the judges of the Division or a section 9 judge.

17. As to any second appeal, there is really no room for debate. List 3 article 68 directs it to this court, where it would go through the ordinary filter of a permission application. So that seems to me to demonstrate that the alternative procedures ordered by Charles J on 18 May were wisely made and that there will therefore be a fixture on 29 July, which I hope has a sufficient time estimate to ensure that all outstanding issues can be addressed and decided.

18. We have taken the opportunity today to deal with necessary further directions to ensure that the hearing of 29 July is productive. It is agreed that the mother's evidence in support of her first appeal must be filed by 23 June, the father's evidence in response 14 days thereafter, the mother's in reply seven days after that. It is also agreed that the mother may amend her Notice of Appeal and that must be done within seven days. It is effectively agreed that the stay granted by paragraph 4 of Macur J's order should be extended until the determination of her first appeal, hopefully by the end of the Trinity Term.

19. The only issue in dispute as to directions is as to the appointment of a CAFCASS officer. Mr Howard for the mother, who seeks that appointment, urges that the appeal is brought under article 23 which provides the grounds of non-recognition of judgments relating to parental responsibility. He will seek to rely on grounds (a) and (b) within article 23. It seems to me that his essential ground is (a), and accordingly I record that Article 23(a) reads:

> "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."

20. Mr Howard sketches that the order of the Milan court is so draconian as to offend our notions of public policy. It seems to remove the child into care when no application for care had been made by the Municipality. It seems to envisage the export of the child to Milan. It seems to envisage the separation of mother and child. He says that given that the public policy prism is to be applied taking into account best interests, the judge on 29 July is entitled to have a professional assessment of the relationships within the family and the child's environment, particularly given, he says, that there was no such investigation made by the Tribunale Ordinario. Mr Nicholls says really this is

an attempt to review the substance of the decision below and accordingly it would be quite inappropriate to involve a CAFCASS officer.

21. This is a matter of discretion and it is for me a finely balanced decision but in the end I come down on Mr Howard's side, given that if the content of the report is of little bearing on the argument as it develops, nothing much will be lost, whereas if the judge feels that he needs some sort of welfare assessment, it would be very unfortunate if there had to be an adjournment in order to bring it in belatedly. I would simply request the unit that particularly deals with cross-border cases to visit mother and child in their home in the Reading area and to report if at all possible by 17 July. I would frame it as a request rather than a direction, given that the task may simply be beyond the resources of the unit. I have no idea what their current workload is, but if possible that further evidence should be before the judge.

22. Before concluding this judgment I want to record what is an incidental ingredient, namely the involvement of the Mediation Office of the European Parliament. It seems that the mother made an approach to the Mediation Office of the European Parliament, an office which deals with children who are victims of parental abduction in bi-national families. The director of the office, Magdalena Kleim, receiving this request, endeavoured to engage the parties. There was no doubt at all of the mother's commitment to mediation, and one of the father's Italian lawyers faxed Mrs Kleim saying that the father "seriously considers" the mediation. Mrs Kleim also communicated this circumstance to my office and furthermore informed the office that the appointed mediator would journey from Brussels to London today to undertake the mediation if the parties consented.

23. At the sitting we enquired as to whether the parties had attended this morning. Of course, it was easy for the mother to attend and she is here. For the father there are all sorts of difficulties in his attendance which I will not record, and it is not surprising that he has not been able to be here. That of course frustrated any prospect of immediate entry into mediation, but instructions were taken on the telephone and we were plainly told that father is not going to enter into mediation. That seems to me sad. If ever there was a case that cried out for some alternative to elaborate and expensive litigation in two European member states, it is this.

24. Furthermore, what is really in issue between the parents? It is only the question of the relationship between S and her mother and S and her father and perhaps the relationship between the parents themselves. All those issues are far better tackled by co-mediators, one legal, one psychological, as is proposed by the Office of the European Parliament. Plainly if the parties could only put the welfare of S first and foremost, there would be a foundation upon which mediation could proceed and succeed.

25. I would emphasise that in internal family justice, even in cases involving more than one European jurisdiction, there is an increasing emphasis on the importance of mediation.

26. Furthermore, the European Directive is before the member states for incorporation into domestic law by the summer of 2011. There is the Office of the European Parliament. There is the Association of European Judges supporting mediation (GEMME). There is about to be launched a Dutch pilot scheme which will require the judge in any case of child abduction to consider the referral to mediation at the earliest stage in the proceedings. There is the current work of the Hague Conference which seeks to explore the introduction of structured mediation in any case of the abduction of a child between states party to the 1980 Convention and some other jurisdictions. In a domestic context there is the ADR scheme of this court, which seeks wherever possible to direct contested family proceedings into mediation in the conviction that mediating solutions are always to be preferred to solutions that are traditionally imposed.

27. So it is very sad that at the moment the father is resistant to this possibility. He has the opportunity for reflection and reconsideration, given that the case is now directed into a further hearing in this jurisdiction which will inevitably be expensive. So I would hope that the decision that he has communicated to his London lawyers this morning is not set in stone, and that he will, before the expenditure in preparation and in briefing for the hearing, take advantage of the availability of the Office of the European Parliament. I would only add that if the Court of Appeal ADR scheme could assist in any way it would. I doubt that, since this is classically a mediation that must be conducted not here but in the Italian jurisdiction by Italian professionals. So with that last exhortation, I would conclude this judgment.

Lord Justice Wall:

28. I agree and do not wish to add anything.

Order: Appeal remitted to High Court