RE S-R (JURISDICTION: CONTACT)

Family Division

Jonathan Baker QC

1 April 2008

Contact – Enforcement – Foreign consent order – Changed circumstances – BIIR – Jurisdiction to make substantive orders

Enforcement – Foreign consent order – Contact – Changed circumstances – BIIR – Jurisdiction to make substantive orders

Jurisdiction – Enforcement – Foreign consent order – Contact – Changed circumstances – BIIR – Jurisdiction to make substantive orders

The Spanish father and the British mother signed a separation agreement as part of the Spanish divorce process; it provided that the child was to remain in the care and custody of the mother, although parental rights were to be shared; that the mother and child would move to England; and that the father would have access, including ultimately staying access in Spain with the child. A Spanish consent order was made on the basis of this agreement, including detailed access arrangements. Subsequently, however, the mother issued an English divorce petition and obtained a residence order in respect of the child, making no reference to the existence of the Spanish order. The father applied in England for a stay of the mother's divorce proceedings, and for recognition, registration and enforcement of the Spanish order. The English court granted the stay and registered the Spanish order. Eventually, after a positive Cafcass report, based on observation of contact in both Spain and England, the English court exercised its jurisdiction under Art 48 of BIIR to make practical arrangements respecting the father's rights of access under the Spanish order. For a year or so there was regular and steadily increasing contact in England and Spain, including staying contact, leading eventually to a visit in Spain by the child on his own. However, the child became very distressed at the start of one contact visit in Spain. He had already been referred for help with behavioural problems, and the mother commissioned a report from his psychologist and mental health practitioner, without reference to the court. That report suggested that the child did not want to spend prolonged periods of time in Spain away from his mother and that the prospect of doing so made him anxious. The mother relied on the report to cancel the summer holiday contact that should have happened under the order. The father now sought enforcement of the Spanish order. There had been some contact between the father and the child, but not staying contact in Spain, and only limited staying contact in England. The mother had now developed severe anaemia, was due to undergo tests, and was therefore unable to travel to Spain for a while. The father had initiated the final stage of the Spanish divorce proceedings, but these were still ongoing.

Held – adjourning the father's enforcement application and making interim arrangements for access under the Spanish order –

(1) Jurisdiction over matters concerning parental responsibility of the child had been acquired by the Spanish court when the Spanish divorce process began, and had remained with the Spanish court. The general rule in Art 8 of BIIR that the court of the child's habitual residence had jurisdiction, was displaced by the provisions of Art 12. Under Art 12, the court of a Member State exercising jurisdiction on an application for divorce acquired jurisdiction concerning parental responsibility provided that: (1) the matter relating to parental responsibility was connected with a divorce application; (2) at least one of the spouses had parental responsibility for the child; (3) the court's jurisdiction had been accepted, expressly or otherwise, in an unequivocal manner by the spouses and the holders of parental responsibility at the time the court was seised;

(4) the court concluded that it was in the 'superior' interests, that is the best interests, of the child that the court should accept jurisdiction. Having acquired jurisdiction the court retained it until either the jurisdiction ceased automatically on the occurrence of any of the events in Art 12, para 2, or the court itself transferred jurisdiction pursuant to Art 15. The making of a final judgment or order in the parental responsibility proceedings did not terminate the parental responsibility jurisdiction if the divorce proceedings were still ongoing. While the acquisition of jurisdiction over parental responsibility was conditional upon the court being satisfied that it was in the 'superior' interests of the child, the retention of jurisdiction was not, although concerns as to whether the jurisdiction was in the child's best interests might engage Art 15, either on the application of a party or on the court's own motion (see paras [64]–[69]).

(2) Jurisdiction acquired in one country by virtue of Art 12, para 1, could not be terminated by the decision of a court in another country: (1) there was no express provision to that effect in Art 12, para 2, which dealt with the circumstances in which jurisdiction ceased; (2) the result of such a provision would be to create the sorts of conflicts of jurisdiction that BIIR was designed to avoid; (3) such a provision would render Art 15, in particular para 2(c), otiose. The terms of Art 15 made it crystal clear that a transfer of jurisdiction was a decision for the court of the Member State seised of the matter, not the court of any other country (see para [70]).

(3) There were strong and cogent reasons in this case for jurisdiction to be transferred under Art 15, including the child's best interests, and the court would apply, pursuant to Art 15, para 2(c), to the Spanish court for the transfer of the jurisdiction of all matters concerning parental responsibility. Such a transfer was accepted, indeed supported, by the mother, satisfying the Art 15, para 2(c) condition that such a transfer be accepted by at least one of the parties. The court had initiated a dialogue with the Spanish court, following the practical advice set out in the Practice Guide for the application of BIIR, would keep the parties informed of its progress, and, unless there were strong countervailing reasons, would copy all written and email communications to the parties via counsel (see paras [72], [76]).

(4) The application to enforce the Spanish order would be adjourned for about 4 months with liberty to apply. So long as jurisdiction vested in the Spanish court, any application to the English court under s 8 of the Children Act 1989 would inevitably be stayed. If, by the hearing date, jurisdiction had been transferred, s 8 proceedings would be underway; if jurisdiction had not been transferred, the father could renew his application to enforce the order during the school summer holidays and beyond (see paras [72], [78], [79]).

(5) The court had no power to vary the Spanish order, which remained in effect; only the Spanish court could vary it. So long as that order remained in force, the powers of the court were restricted to those allowed by Art 48, namely to make practical arrangements for the organising of the exercise of rights of access under the Spanish order; in making those arrangements the court must respect the essential elements of the Spanish order. Taking into account the current circumstances, the mother was to make the child available for access with the father in England, to include staying access. Any agreement for access in Spain during the adjournment would be warmly endorsed by the court (see paras [71], [80]–[82]).

Statutory provisions considered

Children Act 1989, s 8

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 (Brussels II) (2000) OJ L 160/19

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in

Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Arts 3, 8–16, 19, 47, 48, 50, 53, 68

Cases referred to in judgment
Chorley v Chorley [2005] EWCA Civ 68, [2005] 1 WLR 1469, [2005] 2 FLR 38, CA
G (Foreign Contact Order: Enforcement), Re [2003] EWCA Civ 1607, [2004] 1 WLR 521, [2004] 1 FLR 378, CA

James Turner QC and *Ian Cook* for the applicant
Henry Setright QC and *Hassan Khan* for the respondent

Cur adv vult

JONATHAN BAKER QC:

Introduction
[1] The application now before the court is the plaintiff father's further application for enforcement of a child contact order made by consent by a court in Spain on 6 February 2003 in respect of S-R, the child of the parties, who was born on 18 November 1999.
[2] The application comes before me on the direction of Mr Peter Jackson QC (sitting as a deputy judge of this Division) given on 20 December 2007. Mr Jackson's order provided for the possibility of a further application being made by the mother and, if made, to be considered at this hearing. But, in the event, no such application has been made and the only application before me, therefore, is the father's application for enforcement. But the arguments advanced in the course of the hearing have extended beyond enforcement to cover wider aspects of the Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000, commonly known as Brussels II Revised (BIIR), that have not hitherto been considered by the English courts.

Background
[3] I take the salient features of the history of the case from the comprehensive and very helpful chronology prepared by Mr James Turner QC and Mr Ian Cook on behalf of the applicant father.
[4] The father was born in 1960 and is now aged 47. He is a Spanish national who lives in Collado-Villalba in Spain, some 40 kilometres outside Madrid. The mother was born in 1962 and is, therefore, now aged 45. She is a British national currently living in Liverpool. The father has been married before and there is an older child of that first marriage, D, now aged about 25, who lives in Spain. The parties to these proceedings were married in Liverpool in 1988, but their matrimonial home at all material times was in Collado-Villalba in Spain. Although the mother is English, she is fluent in the Spanish language. The child who is the subject of these proceedings, S-R, was born on 18 November 1999 and is, therefore, now aged some 8 years, 4 months.
[5] In October 2002 the parties agreed to separate and the father moved out of the matrimonial home. On 1 December 2002 a separation agreement

was signed by the parties as part of the Spanish divorce process, each party having had the benefit of legal advice. The agreement provided for *inter alia* the mother and S-R to have the right to occupy the former matrimonial home in Collado-Villalba until 1 September 2004, at which time they were expected to move to Liverpool. Meanwhile, the father was to live elsewhere. It was also recorded in the written agreement that S-R would remain under the care and custody of the mother, with parental rights being shared by the parents, and with specific provision being made as to access between the father and S-R, both before and after the envisaged move to Liverpool.

[6] The provisions for access after the mother and S-R moved to Liverpool were expressed in the agreement in these terms:

> 'Once the mother and son move to Liverpool the father may visit him on alternate weekends, although this arrangement must be as flexible as possible depending on the travel and accommodation conditions that the father can get on each occasion, and with prior notice the child's mother.'
>
> 'Holidays
>
> The son shall spend the summer holidays with his parents, dividing the period in half so that he spends at least 15 consecutive days with his father and a further 15 days with his mother. The Christmas holiday shall be divided into two periods. From 23 to 29 December and from 29 December until 7 January, alternating so that in the first year he spends the first period with his mother and the second with his father, and the other way round the next year, and so on. The Easter holiday shall be spent with the father in one year and with the mother in the next year, starting with the mother in the first year.
>
> Exceptionally, the child is to spend the whole of the first Christmas (2002 to 2003) with his mother, since she is intending to move to Liverpool with him for the entire holiday period, while the first summer holidays (2003) that are due to the father shall be spent in Liverpool in the company of the mother as well, unless the relationship between the two parents makes this inadvisable, in which case they shall be limited to daytime visits until the child reaches four years of age, and from then on proceeds normally in accordance with the previous paragraph.
>
> In any event, the spouses agree to make the foregoing access and holiday arrangements suitably flexible and modify them in accordance with the employment commitments of the father and mother, but in the case of dispute the terms of the above agreement must be observed.
>
> Should the son fall ill, this shall be sufficient cause to interrupt the access arrangements, although in such cases the father shall be permitted to visit the child at the mother's address and the latter must submit medical reports certifying the illness.'

[7] On 6 February 2003 an order was made by consent by the Court of First Instance 1 in Collado-Villalba as part of the Spanish divorce process, formally approving the terms of the separation agreement. The issuing judge was Mr David Rodriguez Fernandez Yepes.

[8] Although the agreement approved by the court had provided that the mother and S-R would remain in Spain until September 2004, in fact, with the

father's agreement, they returned to this country a year earlier than originally planned in July 2003. Until their departure the father had been exercising his access rights and, after their return to this country, the father visited England and had contact with S-R in November 2003 and again in February 2004.

[9] On 5 May 2004 the mother issued a divorce petition in the Liverpool County Court. That petition failed to make any reference to the existence of the Spanish order, and similarly, there was no reference to the order, nor the agreement, in the statement of arrangements for the children filed with the petition. A week later, on 12 May 2004, the mother issued an application in the Liverpool County Court for a residence and specific issue order. Although there was some reference to the agreement in the rider to the application, neither the Form C itself nor the rider made any reference to the existence of the Spanish order. The specific issue order sought by the mother was in respect of a medical operation. On 19 May 2004 District Judge Smedley (sitting in Liverpool County Court) gave directions on the residence application and dispensed with the father's consent as to the proposed operation, whilst giving him notice to apply as he was neither present nor represented at the hearing. On 26 May 2004 the mother filed a witness statement in support of her applications, again making no reference to the Spanish order. In the statement the mother said she was opposed to the father's contact in Spain until such time as there had been a full assessment of his relationship with the boy. On 21 June 2004 another district judge made a residence order in favour of the mother. Again, the father was neither present nor represented at that hearing.

[10] On 29 July 2004 S-R had day surgery at Alder Hey Hospital in Liverpool. On that day the father had visiting contact with S-R. The mother refused to allow S-R to Spain during what was left of the summer holidays that year, but there was an agreement between the parties that a Spanish visit could take place during the half term holidays in October 2004.

[11] On 30 July 2004 the final stage of the divorce proceedings in Spain was initiated by the father after the requisite period of separation had elapsed. An application to the court made on that occasion included a request to join the Attorney-General's Office in Spain to represent the child. In respect of the child, the father sought shared custody with specified period of contact, including periods in Spain. Jurisdiction was accepted by the Spanish court in respect of that application on 9 December 2004. It is important to note that those proceedings have not yet been concluded. It is not entirely clear why that is the case. The father asserts that the reason for the delay is that the mother has neither acknowledged service, nor co-operated with the proceedings in any way.

[12] The contact that had been agreed between the parties to take place in Spain in October 2004, in fact, did not take place. The father says that it was cancelled unilaterally by the mother.

[13] On 18 November 2004 the father issued an application in England for a stay of the mother's divorce proceedings on the basis that the Spanish courts were seised first of the divorce issue. On 8 December 2004 the father issued an originating summons in this court, seeking recognition, registration and enforcement of the Spanish order. That application came first before Singer J the following day ex parte, in accordance with the then appropriate procedure. On that occasion the judge registered the Spanish order and listed the

proceedings for further directions on 12 January 2005. Coincidentally, on the same day, 9 December 2004, the Spanish court accepted jurisdiction for the final stage of the Spanish divorce proceedings, and the following day the father issued an application in the Spanish court for enforcement of the contact provisions of the agreement to prove by the court on 6 February 2003. On 16 December 2004, by consent, an order was made in Liverpool County Court staying the mother's divorce petition.

[14] On 12 January 2005 the matter came back before the High Court, as directed by Singer J, on this occasion before Sumner J. The parties had reached an agreement, in part, on interim contact arrangements, and that agreement was recorded in a schedule attached to Sumner J's order, which also included directions, including a direction for a Cafcass report as to whether and, if so, how the Spanish order should be enforced. The father had contact with S-R after that hearing. On 24 January 2005 the mother filed a notice of appeal against Singer J's registration order, although in practice that appeal was never pursued.

[15] On 17 February 2005 S-R was diagnosed with a syndrome known as Kabuki Syndrome, a rare condition involving certain physical features and on occasions some, usually fairly mild, learning difficulties.

[16] On 22 February 2005 the matter came back before Sumner J, who gave the mother leave to withdraw her notice of appeal against the registration order. The father's application for enforcement of the contact order was adjourned and re-listed on 1 July 2005, and directions were given for a further Cafcass report, requiring the Cafcass officer to observe contact between S-R and his father in Spain over a visit, which had been planned for later that spring. In addition, the parties were given leave to instruct an expert paediatrician to report on the ramifications of Kabuki Syndrome.

[17] Contact in Spain duly took place between 30 March and 3 April 2005 and was observed by the Cafcass officer. There was further contact in England, in Liverpool, between the father and S-R in April 2005. On 20 May 2005 the Spanish court made an order enforcing the contact provisions of its order of 6 February 2003. More contact took place in Liverpool in June 2005 and, at the end of that month, the Cafcass officer filed her report. I note, in particular, that she said this of the father's relationship with S-R at para 29:

> 'S-R loves his father. He looks forward to seeing him and enjoys the time they spend together, provided that time is not too long and S-R knows his mother is nearby.'

[18] The next day, 13 June 2005, a report was filed from the jointly instructed consultant paediatrician, Professor Michael Patton, who agreed with the earlier diagnosis of Kabuki Syndrome, but expressed the opinion that S-R's condition was at the milder end of the spectrum.

[19] The matter came back before the court, as directed, on 1 July 2005, this time before Mr Peter Hughes QC (sitting as a deputy judge of the division). Once again, the father's application for enforcement of the Spanish order was adjourned and listed on 16 November 2005. Further directions were made, and there was further provision for contact between S-R and his father,

pending the adjourned hearing. Pursuant to that order, contact took place between the father and S-R in Liverpool in August 2005, and again in October.

[20] The matter came before the court again, therefore, on 16 November 2005 on the substantive hearing of the father's application for enforcement of the contact agreement, approved by the order of February 2003 in Spain. This time the matter was heard by Munby J. Unfortunately, there is no transcript of any judgment given by the judge on that occasion. Despite that, I am confident that Munby J, in making the order that he did, was exercising the court's power under Art 48 of Brussels II Revised to make practical arrangements for organising the rights of access under the Spanish order. The scheme behind the contact arrangements set out in the schedule to the order made by Munby J was a steady increase in contact, introducing staying contact in Spain over New Year 2006, and thereafter regularly. Pursuant to that order, S-R had contact with his father in Spain over New Year 2005/2006, although not, so far as I understand it, staying contact, and further contact took place between father and son in February 2006 and March 2006 in Liverpool, over Easter 2006 with the father in Spain, and again in May and June 2006 in Liverpool.

[21] In the summer contact had been due to take place for 15 days, but did not, in fact, happen because S-R was allegedly sick shortly before leaving England. There was no further contact until September 2006 when there was a further period of contact in Liverpool. Over half term in October 2006 contact took place in Spain and, on this occasion, the father did have overnight contact for 3 out of the 5 nights. There was further contact in November in England, and again in Spain over New Year, between Boxing Day 2006 and 2 January 2007. On this occasion, S-R visited Spain without his mother. This was the first visit that S-R had made to Spain by himself.

[22] Therefore, to summarise the position, in the year or so after Munby J's order, there had been regular and steadily increasing contact, in England and Spain, including staying contact, leading ultimately to a visit by S-R to Spain without his mother.

[23] Early in 2007, as a result of behavioural problems, S-R was referred by a paediatrician to the local Child and Adolescent Mental Health Service (CAMHS) in Liverpool and, following that referral, he was seen on several occasions by a psychologist, Dr Vance, and a mental health practitioner, Mr Jeffcoat.

[24] Further contact was due to take place in Spain over Easter 2007. But, although S-R was made available for such contact, he became distressed at the airport and the contact did not, in fact, take place. The next contact took place in May in Liverpool, and again in June, also in Liverpool.

[25] On 24 July 2007 a report was prepared by Dr Vance and Mr Jeffcoat, and I quote from it:

> 'During our first appointment it became clear that S-R worried considerably about staying with his father is Spain. He appeared to enjoy spending time with the father, but did not want to spend prolonged periods of time in Spain away from his mother. He enjoyed his father's short visits in Liverpool, but preferred returning to his own

> house to sleep, as opposed to remaining in the guesthouse overnight with his father. According to his mother, S-R's level of worry escalates when they mention Spain.'

[26] Dr Vance and Mr Jeffcoat also spoke to the father (in the presence of an interpreter) in the course of their investigation. The report states:

> 'During this session the father repeated much of what the mother had reported earlier, namely that S-R had become extremely distressed at the thought of spending prolonged periods of time with him in Spain. He [ie the father] was confused and troubled about this, and made it clear that he wanted to rectify the situation. He did express a degree of annoyance at the situation, feeling that his relationship with his son was being sidelined by the mother.'

[27] Dr Vance and Mr Jeffcoat concluded:

> 'We feel S-R would benefit from a slow gradual increase in the amount of time spent with his father. It is our opinion that this could begin in Liverpool, as opposed to Spain. It is our opinion that a visit to Spain would only be successful should Liverpool visits become more positive, and once S-R has happily stayed away from his mother overnight.'

[28] Mr Turner, on behalf of the father, makes the strong point that this report from Dr Vance and Mr Jeffcoat was neither commissioned by the court, nor prepared on the joint instruction of the parties. He further observes that it does not seem that the report makers were in possession of any of the witness statements or the correspondence. They were not aware of, nor had they seen the earlier reports of Professor Patton. Nonetheless, this report was significant because, apparently on the strength of it, the mother cancelled the summer holiday contact which should have taken place pursuant to the detailed arrangements set out in Munby J's order of 16 November 2005.

[29] On 31 October 2007 the father issued a further summons, seeking enforcement of the order of Munby J. That was listed initially on 3 November, but adjourned and came before Mr Peter Jackson QC on 20 December 2007, when he listed the matter for hearing on 20 February, (subsequently adjourned to 11 March) for the court to consider the father's application to enforce the Spanish separation agreement and order.

[30] Meanwhile, contact has continued. In January the mother took S-R to Spain where he saw his father, although no staying contact took place. At the end of January the father travelled to Liverpool for contact with S-R, and on this occasion there was one overnight visit. Contact was anticipated to take place over Easter of this year but, in the event, it has not happened. The mother's solicitors wrote a series of letters, initially asserting that S-R was apprehensive about going to Spain and proposing that contact should therefore take place in Liverpool over Easter. Subsequently, on 3 March the mother's solicitors wrote again, asserting that, for medical reasons, she was unlikely to be able to travel to Spain. At the hearing before me, a medical

report was produced from a general practitioner, disclosing that the mother unfortunately was suffering from severe anaemia and was going to undergo investigative procedures.

[31] On 11 March 2008 the hearing of the father's application to enforce the Spanish order was listed before me. At the conclusion of the hearing I reserved judgment until today for reasons explained below.

The issues

[32] As that summary of the long history of these proceedings demonstrates, this is in many ways a typical sort of case that often comes before the court, namely a dispute about defined contact. The mother accepts that there should be contact, but contends that the current arrangements for contact are contrary to S-R's interests, and potentially harmful. The father accepts that there needs to be some flexibility, but maintains that the existing order should be enforced.

[33] That is the essential issue between the parties. But to what extent is it open to me to resolve it? Mr Turner, on behalf of the father, says that the only application before me is to enforce the Spanish order and my powers are, therefore, strictly limited. Mr Setright, on behalf of the mother, seeks to persuade me to adopt a different course, so as to address the outstanding issues.

[34] So the essential issue for this hearing is this: does the court have jurisdiction to make substantive orders concerning parental responsibility and, if not, what can the court do to acquire jurisdiction?

The law

[35] Since 1 March 2005 jurisdiction, recognition and enforcement of decisions on parental responsibility in the European Union are governed by Council Regulation (EC) 2001/2003 of 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (Brussels II Revised). This Regulation repeals and replaces Council Regulation (EC) 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 (Brussels II). The new Regulation brings together into a single text the provisions on matrimonial matters and matters of parental responsibility.

[36] Whereas the previous Regulation, (Brussels II), applied to decisions on parental responsibility only to the extent that they arose in the context of a matrimonial proceeding and concerned children common to both spouses, Brussels II Revised applies to all decisions issued by a Member State in matters of parental responsibility. In interpreting this new regulation, assistance is available in the form of a practice guide drawn up by the European Commission in consultation with the European Judicial Network. It is important to note, however, that that practice guide is not legally binding.

[37] The matters now before the English and Spanish courts concerning rights of custody and access over S-R fall within BIIR and that Regulation, therefore, applies to this case. BIIR governs this case, notwithstanding the fact that the relevant agreement and order in Spain were made before the Regulation came into force. Under the transitional provisions in Chapter VI of

BIIR (in particular, Art 68, para 3) judgments concerning parental responsibility in matrimonial proceedings given before 1 March 2005 shall be recognised and enforced in accordance with the provisions of BIIR.

[38] The fundamental principle of BIIR is that the court of the territorial jurisdiction of a child's habitual residence is best placed to deal with matters of parental responsibility. Paragraph 12 of the preamble to the Regulation states:

> '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.'

[39] This general principle is reflected in Art 8, para 1 of the Regulation, headed 'General jurisdiction', which provides:

> '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.'

This general rule is, however, qualified by para 2 of Art 8, providing that para 1 shall be subject to the provisions of Arts 9, 10 and 12.

[40] Article 9 provides:

> 'Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State 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.'

The fact that the period of retention jurisdiction is as short as 3 months is further demonstration of the fundamental principle set out in Art 8.

[41] Article 10, which relates to child abduction, does not arise in this case, but Art 12 is highly relevant. It is headed 'Prorogation of jurisdiction'. Prorogation, I am reminded, means 'prolonging or extending'. The first three paragraphs of Art 12 are particularly pertinent to the arguments in this case, and I quote them in full:

> '1 The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where—
>
> (a) at least one of the spouses has parental responsibility in relation to the child; and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2 The jurisdiction conferred in paragraph 1 shall cease as soon as—

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;
(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;
(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

3 The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 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 habitual 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.'

[42] In short, Arts 9 and 12 provide exceptions to Art 8. Together, those three sections provide, in Mr Setright's phrase, a framework for the divination of jurisdiction in matters concerning parental responsibility.

[43] In addition, however, BIIR makes provision in Art 15 for the transfer of jurisdiction from the courts of one Member State to the courts of another. This Article, described in the practice guide as an 'innovative rule', is headed 'Transfer to a court better placed to hear the case', and states:

'1 By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case or a specific part thereof, and where this is in the best interests of the child—

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2 Paragraph 1 shall apply—

(a) upon application from a party; or
(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the child has a particular connection in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.
3 The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State—

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or
(b) is the former habitual residence of the child; or
(c) is the place of the child's nationality; or
(d) is the habitual residence of a holder of parental responsibility; or
(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4 The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1. If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.
5 The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraphs 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the courts first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.
6 The courts shall co-operate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.'

[44] A number of other provisions in BIIR are relevant to this application. First, Art 16, para 1(a) provides that:

'A court shall be deemed to be seised at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent.'

[45] Article 19, para 2 provides that:

'When proceedings relating to parental responsibility relate to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.'

Article 19 para 3 adds that:

> 'Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.'

[46] Chapter 3 of BIIR makes provision for the recognition and enforcement of judgments given in one Member State by the courts of another Member State. Article 47, para 1 provides that:

> 'The enforcement procedure is governed by the law of the Member State of enforcement.'

[47] Of particular note in this case is Art 48, para 1, which provides that:

> 'The courts of the Member State of enforcement may make practical arrangements for organising the exercising of rights of access if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the Member State having jurisdiction as to the substance of the matter and provided the essential elements of this judgment are respected.'

[48] As was recognised by Thorpe LJ in the Court of Appeal in *Re G (Foreign Contact Order: Enforcement)* [2003] EWCA Civ 1607, [2004] 1 WLR 521, [2004] 1 FLR 378, a case under the previous council regulation, 'the peculiar vulnerability of contact orders to change of circumstances' necessitates some flexibility in making detailed arrangements for contact in order to ensure that the orders made by the foreign court are followed.

[49] Finally, it is worth noting that Art 50 of BIIR provides that:

> 'An applicant who in the Member State of origin has benefited from complete or partial legal aid … shall be entitled in some of the procedures provided … to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided by the law of the Member State for enforcement.'

The parties' submissions

[50] I have been greatly assisted by detailed, written and oral submissions from leading counsel and junior counsel, drawing on their unrivalled expertise in international family law.

[51] In his opening submission Mr Turner QC, on behalf of the father, put forward a straightforward case:

(1) The only substantive application before the court is for further enforcement of the Spanish contact order.

(2) That order was made in Spanish divorce proceedings, which should be regarded as having started with the legal separation agreement signed by the parties on 1 December 2002, as approved by the court, by the order of 6 February 2003. Mr Turner drew a helpful analogy with the filing of the requête under French law which, as explained by the Court of Appeal in

the case of *Chorley v Chorley* [2005] EWCA Civ 68, [2005] 2 FLR 38, should be regarded in French law as the step initiating the divorce process.

(3) The order was duly registered under the previous BII Regulation by the order of Singer J on 9 December 2004, and accepted as valid and enforced by the order of Munby J on 16 November 2005 at a point when the mother's concerns about Spanish contact were before the court.

(4) Jurisprudentially and factually, the position now is exactly the same as in November 2005.

(5) The divorce process started by the separation agreement, and the order of 6 February 2003 has been continued by the application of divorce on 3 July 2004 and the order of the court in Spain dated 9 December 2004. In those proceedings the father was seeking an amendment of the existing custody and access order. Those proceedings have not been concluded.

(6) On a proper interpretation of Art 12, para 2, the Spanish divorce proceedings are, therefore, ongoing.

(7) Thus, the usual rule in respect of jurisdiction in Art 8 of BIIR, which would give this court jurisdiction by reason of the child's habitual residence in this country, is overridden by the extension of the Spanish jurisdiction resulting from the ongoing divorce proceedings in Spain pursuant to Art 12.

(8) No application has yet been made in this country under the Children Act 1989 for any order superseding the Spanish order.

(9) If any such application were to be made, the court would be bound to stay it and decline jurisdiction on the grounds that the Spanish court were seised of the matter.

(10) This court has no power to declare or decide that the jurisdiction of the Spanish court has come to an end. It is for the Spanish court to determine whether or not that jurisdiction should continue.

(11) The only way in which jurisdiction can be acquired by this court is if it is transferred under Art 15, but that is a matter for the Spanish court. This court cannot assume jurisdiction under Art 15.

(12) The most this court can do is, pursuant to para 2(c) of Art 15, apply to the Spanish court to transfer the case.

[52] In his submissions Mr Setright acknowledged the jurisprudential difficulties facing his client, but understandably emphasised the strong arguments for future issues concerning S-R's welfare to be decided by this court. He invited the court to give particular weight to the following factors:

(1) S-R has resided in England for approximately 4 1/2 years and, after so long a period, it is predictable that arrangements for any child may appropriately be subject to review.

(2) Unfortunately, S-R's life since he moved to live in England has

not been free of difficulty, and naturally the evidence about, and the investigation of, his problems are rooted in his home country.

(3) In fact, all current information relating to his welfare is in England.

(4) The English courts have been involved in this matter since May 2004, albeit on the father's applications arising out of the Spanish order, but nevertheless, with evidence, argument and a Cafcass report, including on welfare issues.

(5) The Spanish courts have not been involved in any substantive way with S-R's welfare since 6 February 2003.

(6) S-R has a serious and unusual medical condition, Kabuki Syndrome, which has been monitored by the Alder Hay Hospital in Liverpool since diagnosis in 2005.

(7) S-R has behavioural problems being monitored by the Liverpool CAMHS team.

(8) Because inter alia of these unusual factors, there is a considerable body of relevant evidence, including essential expert material about him in England and not in Spain.

[53] In those circumstances, Mr Setright submitted that the court should adopt a pragmatic approach and look for the best method of obtaining jurisdiction in respect of the parental responsibility matters. He identified two approaches, one of which he described as controversial, the other, uncontroversial.

[54] The first, 'controversial', approach would be to accept an undertaking on behalf of the mother to issue forthwith an application under s 8 of the Children Act 1989. In those circumstances, suggested Mr Setright, jurisdiction would rest with the English court under Art 8, as the country of S-R's habitual residence. He submitted that, whilst the jurisdiction of the courts of Spain was accepted by the mother at the time that the Spanish agreement and order came into being, and that the father as a holder of parental responsibility is habitually resident in Spain, the Spanish court should not retain jurisdiction within the terms of Art 12 because:

(1) final orders had been made in respect of matters of parental responsibility, pursuant to Art 12, para 2, or alternatively

(2) it is not in the 'superior interests of the child', pursuant to Art 12(1)(b), or the 'best interests of the child', pursuant to Art 12(3)(b).

[55] Mr Setright conceded that there are today still pending divorce proceedings, which were issued by the father in Spain but, he submitted, final orders have been made in respect of the matters related to parental responsibility on 6 February 2003.

[56] In the alternative, he submitted that, if the court is not satisfied, because of the ongoing unresolved Spanish divorce process, that there have been final orders in Spain in relation to parental responsibility, it should consider Art 12 (1)(b) in its entirety. He submitted that for a Spanish jurisdiction to survive, this court must find that the parties have accepted the

Spanish court's jurisdiction at the time of seising, and that the retention of jurisdiction by the Spanish court is in the superior interests of the child.

[57] He summarised his submission on the first 'controversial' approach in this way. Where, as in S-R's case, there has been a lawful change of habitual residence, there exists a tension between the fundamental principle of the BIIR Regulation and the specific provisions of Art 12, para 2. Whilst Art 9 would only allow the Spanish court to retain jurisdiction for a period of 3 months following the mother and child's removal to England, Art 12 para 2 may appear to allow the Spanish court to retain jurisdiction where there are pending proceedings for an indefinite period.

[58] Mr Setright submitted that the means of resolving that tension in a way which is consistent with the child's welfare was to be found in the elements of Art 12 para 1(b), namely the requirement that a maintained jurisdiction after a change of habitual residence must be in the superior interests of the child.

[59] The second approach, 'uncontroversial', to use Mr Setright's candid description, is an application to transfer the proceedings under Art 15. He informed me that, in the event that I was unpersuaded by his previous submissions, and concluded that the Spanish jurisdiction remains current, exclusive and effective, his client would seek to apply forthwith to the Spanish court for a transfer of jurisdiction pursuant to Art 15. Alternatively, he submitted that there were manifestly sufficient grounds for this court to make such an application for transfer to the Spanish court under the powers granted under Art 15, para 2(c). There is, submits Mr Setright, demonstrably a 'particular connection between S-R and this country' within the meaning of Art 15 para 3. In the event that the court was minded to adopt this course, Mr Setright suggested that the appropriate order at this interim stage would be in the following terms:

> 'Pending resolution of the Article 15 application by the Spanish court, any application for relief by way of enforcement of the existing Spanish order be adjourned with liberty to apply.'

[60] So far as the immediate future is concerned, Mr Setright, relying on his client's unfortunate health problems as described in the GP's letter, advocated an amendment of the order, so that over the Easter holiday and the immediate aftermath there would be contact in England, to include staying contact. In addition, there could be telephone and email contact.

[61] In reply, Mr Turner refuted Mr Setright's submission concerning Art 12, arguing:

(1) that there is a divorce application in Spain, which has been ongoing since 2003;
(2) the Spanish court, therefore, has jurisdiction concerning matters relating to parental responsibility connected with that application;
(3) both the father and the mother had expressly and unequivocally accepted that jurisdiction;
(4) it is not for this court to declare that the Spanish court no longer

has jurisdiction under Art 12 – to do so would risk precisely the sort of conflicts which BIIR is designed to avoid – and

(5) if this court has a clear view that jurisdiction should be transferred, it should adopt the clear procedure under Art 15.

[62] As to Art 15, Mr Turner frankly acknowledged that, while he was unable to consent to an application being made, he was equally unable to dissent from Mr Setright's arguments as to why the English court was now the more appropriate forum. He also accepted a point I put to him in the course of argument, that the father might find that enforcement of an English order by the English court was a less complex process than enforcement of a Spanish order, although it seems unlikely that public funding will be as readily available to the father in proceedings under the Children Act 1989 as it is on an application in England to enforce the Spanish order.

[63] So far as the immediate future is concerned, Mr Turner emphasised the father's principal argument that there is still an existing Spanish order for contact, supplemented by the detail spelt out in Munby J's order, and that this court has no power to interfere with the substance of the order. Having said that, he acknowledged the practical reality that contact in Spain over Easter and in the immediate aftermath was unlikely to occur, given the difficulties with the mother's health. He conceded that it would be appropriate for this court, pursuant to Art 48, to make a further order dealing with practical arrangements, but he contended that any such order should be clearly expressed as a practical rearrangement due to force of temporary circumstances, rather than any substantial or substantive variation of the Spanish decision.

Decision

[64] At this stage, the jurisdiction over matters concerning parental responsibility of S-R remains with the Spanish court. The general rule in Art 8 giving jurisdiction to the courts where the child is habitual resident is displaced by the provisions of Art 12.

[65] I interpret Art 12, paras 1 and 2 in this way. The court of a Member State exercising jurisdiction on an application for divorce acquires jurisdiction in respect of matters relating to parental responsibility if all of the following four conditions are satisfied:

(1) The matter relating to parental responsibility is connected with a divorce application.

(2) At least one of the spouses has parental responsibility for the child.

(3) The court's jurisdiction has been accepted, expressly or otherwise, in an unequivocal manner by the spouses and the holders of parental responsibility at the time the court is seised, which (as stated above) means by virtue of Art 16 at the time the document instituting the proceedings is lodged with the court.

(4) The court of that Member State concludes that it is in the superior interests, meaning (as I understand it) the best interests, of the child that that court should accept jurisdiction.

[66] Having so acquired jurisdiction, that court retains it until:

(1) the jurisdiction ceases automatically upon the occurrence of any of the events in Art 12, para 2; or
(2) that court transfers jurisdiction pursuant to Art 15.

[67] Where a court exercising jurisdiction on an application for divorce has jurisdiction over parental responsibility matters under Art 12, para 1, the jurisdiction continues if the divorce proceedings continue, or until jurisdiction is transferred under Art 15. The making of a final judgment or order in the parental responsibility proceedings does not terminate the parental responsibility jurisdiction if the divorce proceedings are still ongoing.

[68] Furthermore, whilst the acquisition of jurisdiction over parental responsibility matters is conditional inter alia upon the court being satisfied that it is in the superior (ie best interests) of the child, the retention of jurisdiction is not conditional upon the court being satisfied that it remains in the best interests of the child, although if concerns arise about whether it remains in the best interests of the child for the court to retain jurisdiction, that might engage Art 15, either on the application of a party or on the court's own motion.

[69] When, in this case, the divorce process was started in Spain, which in my judgment, occurred with the signing of the separation or, at the latest, the approval of that agreement by the court on 6 February 2003, the Spanish court acquired jurisdiction in respect of matters of parental responsibility connected with that process, including custody and access. In my judgment, the Spanish court retains jurisdiction under Art 12 because none of the events in Art 12, para 2 has yet occurred.

[70] I reject Mr Setright's submission that, for a Spanish jurisdiction to survive in this case, this court must find that the retention of jurisdiction by the Spanish court is in the superior interests of the child. This seems, with respect, to be a misreading of Art 12, paras 1 and 2. I also reject the suggestion that jurisdiction acquired in one country by virtue of Art 12, para 1 could somehow be terminated by the decision of a court in another country, for these reasons:

(1) If that had been the intention, I would have expected there to be an express provision to that effect in Art 12, para 2, which stipulates the circumstances in which the jurisdiction must cease.
(2) If the courts of one Member State were to have the power to terminate the jurisdiction of the courts in another Member State, the result would be precisely the sort of conflicts of jurisdiction which the Regulation is designed to avoid.
(3) If a court of one Member State could usurp the jurisdiction of another Member State, if it considered that course to be justified by the best interests of the child, the provision of Art 15, and in particular Art 15, para 2(c), would be otiose. In fact, Art 15 considered as a whole supports my interpretation of Art 12, para 1, since it provides a clear way for the court of a Member State to transfer jurisdiction, if it considers this to be in the best

> interests of the child. The terms of Art 15 make it crystal clear that this is a decision for the court of the Member State seised of the matter, and not the court of any other country.

[71] The Spanish order supplemented by the order of Munby J remains in effect. This court has no power to vary the Spanish order. Only the Spanish court can vary it. So long as that order remains in force, the powers of this court are restricted to those allowed by Art 48, namely to make practical arrangements for the organising of the exercise of rights of access under the Spanish order. In making those arrangements, this court must respect the essential elements of the Spanish order. Although I have no transcript of the judgment given by Munby J on 16 November 2005, it seems obvious to me that, in making the detailed arrangements set out in the schedule thereto, he was faithfully complying with the provisions of Art 48.

[72] Since jurisdiction remains at this stage vested in the Spanish court, any application to this court under s 8 of the Children Act 1989 would, at present, inevitably be stayed. I accept, however, that there are strong and cogent arguments in support of a transfer of jurisdiction to this court, as particularised by Mr Setright in the passage of his submissions to which I already referred. I express a prima facie view that jurisdiction should, by way of exception, be transferred to this court under Art 15 for the following reasons:

(1) S-R has a particular connection with this country in the sense specified in Art 15, para 3(c), ie he has become habitually resident after the Spanish court was seised of the jurisdiction.
(2) This court would be better placed, in my judgment, to hear that part of the Spanish matrimonial proceedings that relates to the exercise of parental responsibility for S-R. The outstanding parental responsibility issues and evidence about those issues principally concern S-R's life and circumstances in England.
(3) In all the circumstances, therefore, it is in the best interests of S-R for jurisdiction to be transferred to this court.

[73] Having reached this prima facie view, buttressed by the detailed reasons identified by Mr Setright, it seems to me that this is a case where this court should apply, pursuant to Art 15, para 2(c), to the Spanish court for the transfer of the jurisdiction of all matters concerning parental responsibility for S-R.

[74] It is a requirement of Art 15, para 2(c) that such a transfer must be accepted by at least one of the parties. In this case, it is accepted, indeed supported, by the mother. On behalf of the father, as I have already said, Mr Turner did not dissent, while not formally consenting.

[75] The Practice Guide for the application of BIIR contains helpful advice as to the practical aspects of Art 15 and, in particular, the following passage on p 20 under the heading 'How should judges communicate?':

> 'Article 15 states that the court shall co-operate, either directly or through the central authorities, for the purpose of the transfer. It may be particularly useful for the judges concerned to communicate to assess

whether in the specific case the requirements for a transfer are fulfilled. In particular it would be in the best interests of the child. If the two judges speak and/or understand a common language, they should not hesitate to contact each other … by telephone or email. Other forms of modern technology may be useful, eg conference calls. If there are language problems, the judges may rely on interpreters. The central authorities will also be able to assist the judges.

The judges will wish to keep the parties and their legal advisors informed, but it will be a matter for the judges to decide for themselves what procedures and safeguards are appropriate in the context of the particular case.

The courts may also co-operate through the central authorities.'

[76] With the encouragement of the parties, I have spoken to Thorpe LJ in his capacity as Head of International Family Justice, and he has agreed to facilitate this process. I have provided him by email with a short summary of the details of the case, which he has communicated to his opposite number in Spain. At his suggestion, my email to him was copied to the parties (through counsel) and to the UK Central Authority. No reply has yet been received from Spain, due perhaps to the intervening Easter break, but I anticipate that very shortly I will be in direct communication with the Spanish judge with direct responsibility for this case. There is no detailed guidance as to how this process should be carried out. The aim is to conduct a dialogue with the Spanish judge to assess whether, in accordance with my prima facie view, the requirements of transfer to this jurisdiction are fulfilled. Language difficulties will be overcome by taking a pragmatic approach. I shall keep the parties informed of the progress of this dialogue and, unless there are strong countervailing reasons, I shall copy all written and email communication to the parties via counsel.

[77] There remains the question of what orders to make in the short term concerning:

(1) the father's application to enforce the Spanish order; and
(2) contact.

[78] So far as the enforcement application is concerned, both parties are agreed that, if the court concludes that the right course is to seek transfer of the jurisdiction under Art 15, the appropriate order is to adjourn the application to enforce for about 4 months with liberty to apply. The date of 7 July has been identified as convenient for the parties. By that stage, it is hoped that the issue of any transfer by the Spanish court under Art 15 will have been resolved. If jurisdiction has been transferred, no doubt proceedings under s 8 of the Children Act 1989 will have been started, and that hearing can be used as appropriate in those proceedings.

[79] If, however, jurisdiction has not been transferred, either because the Spanish court has refused the application or because no decision has yet been reached, the father can renew his application to enforce the order during the school summer holidays and beyond.

[80] Finally, so far as contact during the next 4 months is concerned, I remind myself that I have no power to make any order that might violate the

essential elements of the Spanish order. Instead, my powers under Art 48 are merely to make practical arrangements for organising the exercise of rights of access.

[81] From a practical perspective, I take into account the following factors:

(1) The mother is unwell and due to undergo surgical tests. Accordingly, she is unable to travel to Spain during the Easter holidays and in the immediate aftermath.
(2) Because of present circumstances, S-R is unable to travel to Spain without his mother.
(3) The father is unable to afford to fly to England at short notice over the Easter Holidays.
(4) The father will, however, be able to afford to fly to England at some point in April.

[82] In those circumstances, I direct that, prior to the hearing in July, the mother shall make S-R available for access with his father in England, to include staying access, on such date as may be agreed between the parties, and for such other access as may be agreed between the parties. If the parties are able to agree access in Spain at any point during the next 4 months, that would be warmly endorsed by this court. Nothing I have said concerning contact in the next 4 months is intended to vary or undermine either the Spanish order of Munby J's order of 16 November 2005. On the contrary, this court strongly endorses the view that it is manifestly in S-R's interests to establish the closest possible bonds with his father and his Spanish family.

[83] I will give the parties liberty to apply as to matters of interim contact on 14 days notice. In the circumstances, and with the encouragement of both parties, I shall reserve all applications concerning S-R in this country to myself until further order.

Order accordingly.

Solicitors: *Dawson Cornwell* for the applicant
Morecrofts for the respondent

PHILIPPA JOHNSON
Law Reporter