Prorogation under Art 12 BIIR: the death-knell of advance prorogation?

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E v B (Case No 436/13)

On 1 October 2014 the Court of Justice of the European Union (CJEU) handed down judgment in the matter of *E v B* (Case 436/13) [2015] 1 FLR 64 following a hearing which took place on 15 May 2014. The case had been referred to the CJEU by the Court of Appeal, on appeal from the judgment of Mr Justice Cobb which was reported as *Re S (Jurisdiction: Prorogation)* [2013] EWHC 647 (Fam), [2013] 2 FLR 1584. The background (addressed here only to give context to the question asked of the CJEU by the Court of Appeal) was as follows:

- The parties met and commenced their relationship in Spain. In due course they had a child, S, who at the time of the hearing before the CJEU was 9 years old.
- In February 2010 the mother removed S from Spain to England. The parties differed as to whether that removal was undertaken with the father's consent.
- In March 2010 the father issued proceedings in Spain seeking residence and contact. Those proceedings were later withdrawn following discussions between the parties. Those discussions resulted in an agreement which was signed by the mother, but not by the father, in April 2010.
- In June 2010 the father issued fresh proceedings seeking residence of S.
- In late June 2010 the mother travelled with S to Spain so that S could have contact with the father. At the conclusion of that contact (and for reasons in dispute as between the parties) the father retained S in his care.
- Following the retention the mother and father resumed discussions about the arrangements for S's care, and in due course a further agreement was reached which was signed by both parties.
- On 20 October 2010 the parties' agreement was put before the Spanish court and approved by a Judge, who made the agreement into a court order. The agreement provided for S to live with the mother, but to have frequent contact with the father in England and in Spain.
- S had returned to England with the mother in August 2010. Following that there was no contact between S and the father, and on 17 December 2010 (less than two months after the making of the Spanish order) the mother issued proceedings in England seeking to vary the terms of the Spanish order, particularly by reducing contact between S and his father.
- The father countered the mother's application by applying to enforce the Spanish order pursuant to the enforcement provisions of Brussels II Revised.
- In due course Mr Justice Charles ordered that the Spanish order be enforced. The mother indicated an intention to apply in Spain for the transfer of jurisdiction from Spain to England pursuant to Art 15 of Brussels II Revised.
- The mother duly applied in Spain, and on 29 February 2012 a judge in the Spanish court ruled that: 'The judgment delivered in these proceedings having become final, the proceedings having been filed and there being no other family proceedings pending between the parties in this court, there is no reason to declare the lack of jurisdiction applied for'.
- The mother therefore applied back to

the English court, seeking a declaration that the court had jurisdiction pursuant to Art 8 of Brussels II Revised, and asking that the contact arrangements between S and his father be reconsidered and varied.

- On 15 February 2013 the mother's application came before Mr Justice Cobb, who made the declaration sought and lifted the stay on the mother's contact application which had been imposed by Mr Justice Charles upon enforcement of the Spanish order. The father then appealed, leading to the referral to the CJEU.

The Court of Appeal asked two questions of the CJEU:

(1) Where there has been a prorogation of the jurisdiction of a court of a Member State in relation to matters of parental responsibility pursuant to Art 12(3) of (Regulation No 2201/2003), does that prorogation of jurisdiction only continue until there has been a final judgment in those proceedings or does it continue even after the making of a final judgment?

(2) Does Art 15 of (Regulation No 2201/2003) allow the courts of a Member State to transfer a jurisdiction in circumstances where there are no current proceedings concerning the child?

The questions asked of the CJEU were directed towards (and intended to resolve) the jurisdictional issues that arose as a result of the mother's application to Mr Justice Cobb – which was for a declaration that the courts of England and Wales held and could exercise substantive jurisdiction concerning the child pursuant to Art 8 of Brussels II Revised. That jurisdictional conundrum, whilst being significant to the instant case, in fact served to highlight a number of wider ranging issues that the judgment of the CJEU might be said to have addressed, whether satisfactorily or not.

As such, whilst the issue with which the English courts were engaged was that of its jurisdiction to make substantive orders concerning, that particular question had a wider impact on other issues that arise more frequently in cases of recognition and enforcement, and in other contexts. For those seeking recognition and enforcement of a foreign order, the issue of jurisdiction is perhaps only incidental to the powers of the court of enforcement, and particularly whether that court is constrained to enforce the order (unless one of the 'defences' to enforcement available under Art 23 are met), or whether that court is empowered to consider the position afresh and to vary or otherwise revisit the terms of the order that it is sought be enforced.

The question as to whether, and if so on what criteria, the courts of a Member State are entitled to review and vary an order made by the courts of another Member State and presented for enforcement is one that has probably never been satisfactorily answered within the jurisprudence concerning the recognition and enforcement of foreign orders. When we say 'vary' we use the term not in the strict technical sense but in the sense of making its own order which is different to and perhaps contradictory to the order made.

The jurisdictional scheme applicable where orders are made on the basis of a child's habitual residence is perhaps clear. Where an order is made on the basis of an Art 8 jurisdiction and is then presented for enforcement in another Member State which does not have jurisdiction under any of the grounds within Brussels II Revised, then the Member State of enforcement cannot vary the order (or otherwise make an order that countermands it) as it does not have jurisdiction to do so. In such circumstances, the court can only consider enforcement, and any application for variation must be made to the courts of the Member State of origin.

Where a court makes an order on the basis of Art 8 and thereafter the child's habitual residence changes, then unless that change takes place following an unlawful move (in which case jurisdiction is retained by the courts of the Member State of origin

pursuant to Art 10) Art 9 will apply, empowering the courts of the Member State of origin to vary orders concerning rights of access for up to 3 months following the lawful move. Thereafter, jurisdiction must be determined on the basis of the usual jurisdiction rules – and it therefore appears that there is nothing within the Regulation to prevent the courts of the Member State of enforcement reviewing the arrangements and making a further or other order if it has jurisdiction under one of those grounds and if the child's best interests require it. That appears to be the view that was taken by the Court of Appeal in the unreported case of *Re R* [2007] EWCA Civ 355 – see particularly para [5] of the judgment.

The difficulties that arose in relation to Art 12 were that:

(a) it is different in its nature to Arts 8 and 10, in that the exercise of jurisdiction based on the parties agreement requires an assessment that it is in the child's best interests for that jurisdiction to be exercised notwithstanding that the child's closest connection (assessed by habitual residence) is with another Member State; and
(b) unlike Art 8, orders made in the exercise of jurisdiction conferred by Art 12 have no automatic temporal protection against variation by the courts of another Member State (as provided to orders made pursuant to Art 8 by Arts 9 and, if applicable, 10).

It was on that basis that it was argued that the prorogued jurisdiction endured beyond the making of a final order. If it was the case that the prorogued jurisdiction of the Spanish court so endured, then the courts of the Member State of enforcement (in this case the English court) would be precluded from reviewing and varying the contact arrangements directed by the courts of the Member State of origin (the Spanish court) and would therefore be limited in its role to enforcing the Spanish order. Any application to vary the order would have to be made to the court that made the order in the first place, which would in this context be the court that the parents had nominated as being best placed to determine issues concerning the child. Of course that court could be invited to then transfer the variation proceedings to the courts of England and Wales pursuant to Art 15.

Conversely, if the prorogued jurisdiction ceased with the making of the final order, jurisdiction would thereafter be determined in accordance with the jurisdictional scheme of Brussels II Revised (and particularly in this case, Art 8), allowing the courts of the Member State of enforcement to review the arrangements made by the foreign order. It was argued on behalf of the father that such an interpretation would be disadvantageous as it would serve to weaken the otherwise robust enforcement provisions of Brussels II Revised by giving national courts a choice between enforcing an order properly made by a foreign court and reviewing the arrangements.

The CJEU approached the case on a purely jurisdictional basis – leaving the interrelationship between the jurisdictional question and the enforcement issue open (though it subsequently transpired that the issue was before the CJEU in a slightly different form in the later case of *C v M* (Case C-376/14 PPU)). Addressed in that way, the CJEU reached the following conclusion:

> 'Jurisdiction in matters of parental responsibility which has been prorogued, under Art 12(3) of 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, in favour of a court of a Member State before which proceedings have been brought by mutual agreement by the holders of parental responsibility ceases following a final judgment in those proceedings.'

In reaching this conclusion the CJEU made the following points:

(a) In considering issues of jurisdiction we must look at the situation at the time

the court is 'seised'; which means when the document instituting the proceedings is lodged (para [38]).

(b) The parties' consent under Art 12(3) must be assessed at the time the court is seised (para [39]) (the inference in the paragraph is that the consent is given contemporaneous with seisin and in relation to that application; rather than an advance and general consent. There is a potential tension with the approach of the Supreme Court in *Re I (A Child) (Contact Application: Jurisdiction)* [2009] UKSC 10, [2010] 1 FLR 361 which considered advance consent).

(c) That under Arts 8 and 12(3) jurisdiction must be established in relation to each specific case which implies it does not continue after the proceedings end (para [40]).

(d) Jurisdiction must be determined in the light of the best interests of the child, which is usually linked to habitual residence/proximity (paras [44] and [45]) but under Art 12(3) may be different.

(e) It could not be assumed that prorogation would be in the child's best interests after proceedings conclude and the best interests of the child must be reviewed in each specific case of whether the prorogation sought is consistent with those best interests.

So, where does that leave the important question of whether the courts of a Member State of enforcement are entitled instead to review and/or vary the provisions of the foreign order? On the basis of the judgment in *E v B*, it would appear to be self-evident that if jurisdiction has been acquired by the courts of that Member State (on the basis, perhaps, of Art 8 or some other applicable ground) the courts of that Member State would be entitled to make substantive orders in relation to the child, which would amount to a variation of the foreign order. If that analysis is correct, the court would have to treat the order as if it were one previously made by the courts of the same Member State, and so would be entitled to vary it perhaps on the basis that some change of circumstance required such a variation in the best interests of the child concerned.

In *C v M*, however, the CJEU seemed to adopt a different approach. At para [67] of the judgment in that case, it was held that:

> 'The possibility that a child's habitual residence might have changed following a judgment at first instance, in the course of appeal proceedings, and that such a change might, in a particular case, be determined by the court seised of an application for return based on the 1980 Hague Convention and Article 11 of the Regulation, cannot constitute a factor on which a parent who retains a child in breach of rights of custody can rely in order to prolong the factual situation created by his or her wrongful conduct and in order to oppose the enforcement of the judgment given in the Member State of origin on the exercise of parental responsibility which is enforceable in that Member State and which has been served. The reason is that if it were considered that a finding of a change of the child's habitual residence by the court seised of such an application would permit the prolongation of that factual situation and the obstruction of the enforcement of such a judgment, that would constitute a circumvention of the mechanism established by Section 2 of Chapter III of the Regulation and would render this mechanism devoid of purpose.'

The factual context of *C v M* was different, however, as in that case the CJEU was asked about the proper approach to determination of a child's habitual residence where the child had moved between Member States (in this case France and Ireland) pursuant to an order that was subsequently overturned on appeal. The particular interrelationship between the jurisdictional and enforcement provisions was not, therefore, part of the questions asked and as such, whilst the paragraph quoted above might indicate the CJEU's view of this difficult issue, it probably cannot be said to bind the approach of the English courts.

This might be said to give rise to an inconsistency between the judgment in *E v B* (which on one interpretation recognises that

the court of enforcement can exercise substantive jurisdiction and therefore vary an order made by the courts of another Member State, or alternatively decide to make another, different order in place of the order that has been put before those courts for enforcement) and the judgment in *C v M* – which suggests a more strict regime.

This potential anomaly is made more difficult to resolve, because it is not entirely clear what the CJEU intended by para [67] of the judgment in *C v M*. The issue of recognition and enforcement was not before the court in that case (just as it was not in *E v B*). As such para [67] might well be considered to be obiter. Similarly, it is not clear whether the CJEU considered the Irish courts to have substantive jurisdiction. The case concerned whether the child could, as a matter of law, acquire habitual residence in Ireland notwithstanding the pending appeal process in France. As such it can be inferred that no court had found that habitual residence had as a matter of fact transferred. The absence of such a determination leaves para [67] without the important context that such a finding would give.

In all of the circumstances it seems unlikely that para [67] of *C v M* could be taken to have undermined the reasoning of the CJEU in *E v B*. At the least it leaves open the question addressed above as to whether and to what extent a court that has acquired substantive jurisdiction in relation to a child can vary or otherwise overrule an order previously made by the courts of another Member State.

The second issue that arises concerns the use of Art 12(3) that has developed within leave to remove applications (whether for temporary or permanent relocation) in this jurisdiction. The prorogation of jurisdiction has become an invaluable tool in such cases where there is a strong case for leave to remove but an enduring concern about (by way of example) whether the removing parent can be relied upon to return (in a temporary case) or commitment to contact (on an application for permanent relocation). In such cases it has become common for the party seeking leave to remove to offer to prorogue jurisdiction either for a time limited period or indefinitely to reassure the judge that if the left-behind parent has any difficulties they can restore the matter to the court that made the leave to remove order without risk of challenge on the basis of loss of jurisdiction. Combined with the possibility of recognition and enforcement in the receiving state, it appears that judges have been tempted to follow such a course in an attempt to avoid such difficulties after the move has taken place.

If a prorogation of that type were said to endure (and, perhaps, to provide an exclusive jurisdiction) orders made on that basis would be strongly bolstered and enforcement of any return/contact provisions assured. If, as was contended in *E v B*, prorogation were to conclude with the making of the final order, then any such security could not be relied upon to achieve the end sought, reducing any certainty that the left-behind parent would be able to seek effective recourse through the courts of the Member State of origin.

The judgment of the CJEU in *E v B* is arguably not consistent with such pre-emptive, free-standing prorogations and probably renders that device redundant in relocation cases; whether the relocation is to another Member State or a non-Member State. The following points would point to this conclusion:

(a) Any such prorogation made during the course of the proceedings would conclude with the making of a final order, so would come to an end perhaps very shortly after the prorogation had been confirmed.

(b) In any event, the CJEU plainly saw the prorogation as having to be given at the time that the court is seised – and therefore, if a final order is made, at the time of the commencement of any subsequent proceedings. That being the case any prorogation entered into at the time of making a final order would not necessarily be valid for the purposes of proceedings later commenced.

(c) The CJEU observed that the child's best interests had to be assessed at the time

the proceedings commenced and there could be no certainty that a court would accept this some months or years down the line.

Based on the above it appears that the judgment of the CJEU in *E v B* removes the possibility of prorogation being used in this way. It is possible to understand why this approach would be adopted when considering the aims of Brussels II Revised and the concept of mutual trust in judicial decisions, but it does seem to remove an important tool to ensure consistency of approach throughout a case based upon an agreement to the courts of a particular Member State exercising jurisdiction in relation to a child.

It may be that the possibility of prorogation is not wholly neutered. For instance parties could give irrevocable undertakings to accept the jurisdiction of the court for any future proceedings, to only issue proceedings in England and could stipulate that they agreed that the English court exercising jurisdiction would be in the child's best interests – either indefinitely or for a specific period. This might be coupled with an undertaking not to issue proceedings in the new state. However this approach is far more uncertain than establishing a prorogued and enduring jurisdiction at the time the final order for relocation is made. It remains to be seen (by trial and error) whether any vestigial remnant of the practice of prorogation in relocation cases can gain acceptance.

Considering the judgment in its entirety, it is apparent that the CJEU confined itself to answering the specific question asked, and that it approached it as a purely jurisdictional issue divorced from the wider context of the recognition and enforcement of foreign orders. The same might be said for the more recent judgment in *C v M*, as that does not appear to address the inter-relationship between the jurisdictional and enforcement provisions either.

As such, there is much fertile ground left for argument about the grounds on which enforcement can be refused and a new and different substantive order made – and the possibility of further references to the CJEU on this issue in the future.

The other significant issue in *E v B* was whether proceedings had to be in place in the requested state in order for an Art 15 transfer of jurisdiction request to be made to the courts of the requested state. It is not uncommon for the English court to be seised of an application in relation to a child where it appears that the courts of another Member State may have jurisdiction but where one or both parties (or the court) consider that the courts of England are best placed to determine the issues in the case. At first instance Cobb J had concluded that there must be proceedings in place in the requested state and that a transfer application could not be made in respect of a 'dormant' jurisdiction. The argument was made that to insist on an originating application being made in the courts of the requested state added a further layer of complexity and was inconsistent with the provisions of Art 15 which permit an application for transfer being made by the court itself rather than the parties. However the CJEU declined to answer the second question because they considered it unnecessary having regard to their answer to the first question. The issue therefore remains unresolved at CJEU level – albeit Cobb J's first-instance decision remains binding.