RE H (JURISDICTION) [2009] EWHC 2280 (Fam)

Family Division

Ryder J

11 September 2009

Abduction – Order for return under Brussels II Revised, Art 11(7) – Summary return rejected by foreign court on basis of settlement – Procedural delay – Whether breach of human rights

Contact – Abduction – Father of abducted child seeking contact order – Whether country of habitual residence retained welfare jurisdiction

The Algerian father and the Spanish mother lived in England, with the child. When the child was about 11 months old, the mother failed to return from Spain at the end of a holiday. The father immediately issued Hague Convention proceedings for the child's summary return. The Spanish court declined to hear divorce proceedings issued by the mother in Spain; the father issued Children Act proceedings in England. The mother intentionally avoided any participation in the English proceedings, repeatedly evading service; she also effectively frustrated contact between the father and the child. The Hague proceedings made slow progress in Spain, at least in part because of an allegation by the mother that the father was a 'fundamentalist'; the Spanish authorities actively investigated this allegation until the Criminal Investigation Court dismissed it as 'not constituting any offence'. At the final hearing in the Hague proceedings, which took place over 18 months after the issue of proceedings, the Spanish court refused summary return, apparently under Art 13(b), noting that the child was settled in an 'excellent situation' with the mother. The father then sought an order for return from the English court, under Art 11(7) of Brussels II Revised. The mother again evaded service and refused to participate in the proceedings. In pursuit of international judicial co-operation, the office of Thorpe LJ established communication with Spain's senior judicial representative; there was reason to believe that this would shortly result in service on the mother and an effective hearing before the English courts. At an interim hearing, notwithstanding the mother's non-attendance, the father sought an order for reasonable direct contact with the child, together with various orders in respect of parental responsibility and recitals to assist in the implementation of contact.

Held – adjourning the proceedings to enable the mother to engage with the court process –

(1) The English court retained jurisdiction to make the welfare order requested of it by the father; until such time as that application was determined, jurisdiction was not ceded to the Spanish courts. The fact of delay, which was not the fault of either the father or the child, did not render the English court's jurisdiction of only technical effect (see para [56]).

(2) The Spanish court's refusal to order summary return to the jurisdiction of habitual residence was difficult to comprehend by reference to Hague Convention principles. The father was entitled to invoke Art 11 of Brussels II Revised in England, and had used every known method to serve the mother and to try to engage her in the English proceedings (see para [57]).

(3) The considerable delay since the father had last had contact would ordinarily be detrimental to the child's welfare and her relationship with the father; absent any adverse welfare information, the English court would seek to facilitate shared residence arrangements or direct and meaningful contact. Given that there was no adverse information about the father available to the court, the court was likely to

make an order for direct contact unless the mother began to engage with the legal process, and provided information about the welfare of the child (see paras [57], [59]).

Statutory provisions considered

Children Act 1989, ss 1(3), 8

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 8

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 11, 13(b)

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 8–12, 15, 16, 42(1), 55, 56, Recitals 17, 18

Cases referred to in judgment

A (Custody Decision after Maltese Non-Return Order), Re [2006] EWHC 3397 (Fam), [2007] 1 FLR 1923, [2007] All ER (D) 149 (Feb), FD

A; HA v MB (Brussels II Revised: Article 11(7) Application), Re [2007] EWHC 2016, [2008] 1 FLR 289, FD

Carlson v Switzerland (Application No 49492/06) (unreported) 6 November 2008, ECHR

Iosub Caras v Romania (Application No 7198/04) [2007] 1 FLR 661, ECHR

ML and AL (Children) (Contact Order: *Brussels II Regulation), Re* [2006] EWHC 3631 (Fam), [2006] All ER (D) 433 (Nov), FD

RC and BC (Child Abduction) (Brussels II Revised: *Art 11(7)), Re* [2009] 1 FLR 574, FD

RD (Child Abduction) (Brussels II Revised: *Arts 11(7) and 19), Re* [2009] 1 FLR 586, FD

Edward Devereux for the applicant
Teertha Gupta for the second respondent

RYDER J:

Introduction

[1] This is the final hearing of proceedings under 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 initiated by the applicant father, (F), by application dated 11 September 2008 seeking orders relating to the only child of the parties, H, who was born on 3 October 2005 and is now 3 years and 11 months old. F relies on the provisions of Arts 11 and 40 of Brussels II Revised and (principally though not exclusively) the judgment of Singer J in *Re A; HA v MB (Brussels II Revised: Article 11(7) Application)* [2007] EWHC 2016, [2008] 1 FLR 289. The matter was last before the court on 27 April 2009 when a detailed directions order was made by Singer J.

[2] F has provided a number of statements and affidavits from himself and his legal representatives upon which the court has relied: his first is dated 9 August 2007; a first statement from Miss Anne-Marie Hutchinson is dated 28 August 2007; a second statement from Miss Anne-Marie Hutchinson is dated 11 September 2008; F's second statement is dated 11 February 2009; a

third affidavit of Miss Anne-Marie Hutchinson (entitled 'second affidavit') dealing with service is dated December 2008; a fourth affidavit of Miss Anne-Marie Hutchinson is dated 23 February 2009, also dealing with service; and F's third statement is undated. The summary of the facts which follows is taken from those materials in the circumstance that the mother has yet to respond to this court by the filing of evidence or otherwise.

[3] The mother (M) has not participated in these proceedings. Her last known address (and that of the child) is in Seville, Spain.

[4] Acutely aware of the considerable delay that has taken place in determining this application, along with the attendant costs, F realistically seeks today an order for reasonable direct contact with H along with various orders in respect of parental responsibility and recitals to assist in the implementation of that contact, notwithstanding that the mother has plainly intentionally and successfully sought to avoid any participation in these proceedings, has repeatedly avoided service initiated by all manner of different mechanisms, and has effectively frustrated contact since her wrongful retention of H in Spain in August 2006. The last time F saw H was for one hour in June 2007. Further delay in granting the orders which F seeks is likely to be regarded as inimical to H's best interests.

[5] To maximise F's ability to successfully participate in contact with H in Spain in the near future, this court has decided to give a detailed judgment which sets out what it intends to do but does not finalise matters for the purposes of Art 10(b)(iv) so that further use can be made of international judicial co-operation before jurisdiction is ceded to Spain. Given the response of the Spanish liaison judge, there may well be advantages at this stage in this approach. The judgment is to be translated and communicated without delay to the Spanish Central Authority and the Spanish liaison judge and also to the last known address and email address of M and her Spanish lawyers.

Factual background

[6] F is an Algerian/British national and M is a Spanish national. F was born on 14 November 1971 in Algeria and is now 37. He spent much of his early life in Algeria, where his close family remain. He studied aeronautical engineering in Algeria before moving to Spain. He came to the UK in 2001. He has in the past worked as a postman and in the restaurant trade. He currently lives with his partner, SN, and their daughter, B, in London. He works for Royal Mail in a delivery office.

[7] M was born on 12 March 1975 and is now 34. M's close family remain in Spain. M came to this country and studied and graduated with a degree in international business and tourism studies at the London Metropolitan University in March 2005. It appears that after a time M did not work as she was in receipt of disability living allowance, perhaps due to her suffering from rheumatoid arthritis.

[8] The parties met and formed a relationship in 2001 and thereafter married in the UK on 5 September 2002. They have one child, H, who was born on 3 October 2005, who is now 3 years and 11 months and who is a Spanish and Algerian national. The parties were in Spain for H's birth and returned to the UK on or around 13 October 2005. The principal matrimonial

home was in London, although in 2004 the parties purchased an 'off plan' flat in Spain. The parties renewed their vows at a ceremony in a register office in London on 24 March 2005.

[9] During the course of the marriage there were frequent trips abroad to Spain and Algeria and frequent discussions, in particular during 2006, about the parties moving to Spain.

[10] On 27 August 2006, M travelled to Spain with H for the purposes of a short holiday planned to be for about one week. At the end of that month she informed F by telephone that she was not intending to return to the UK. F did not provide his consent to this retention and immediately sought advice and assistance as to what to do: after searching on the internet he found details for the international child abduction charity, Reunite.

[11] On 7 October 2006, F initiated proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) in Spain through the Central Authority in London. The Court of First Instance apparently received this application on 24 November 2006.

[12] In November 2006, F travelled to Spain and had contact with H there. On 15 November 2006, the Seville Family Court of First Instance appointed an attorney, Mr Eugenio Carmona Delgado, to act for M.

[13] On 15 December 2006, M issued a divorce petition in the Seville Family Court of First Instance.

[14] There were preliminary hearings in the Hague Convention 1980 proceedings in Spain on 18 December 2006 and in January 2007.

[15] On 5 February 2007, a hearing took place in the divorce proceedings initiated by M in the Seville Court of First Instance, whereby M's divorce petition was admitted for hearing. The matter was then listed for examination at an oral hearing which F was ordered to attend.

[16] By an application issued in the UK on 9 February 2007, F applied, acting in person, for various s 8 of the Children Act 1989 orders: a shared residence order, a prohibited steps order and a defined contact order. It appears that F served M with this application by recorded delivery. The first hearing in respect of those applications was on 20 March 2007. On that date, and in the absence of attendance by M, Deputy District Judge Sheldrake sitting at the Principal Registry of the Family Division in London adjourned the matter to the 8 June 2007 so that directions could be made.

[17] On 7 May 2007 as indicated by a ruling dated 14 May 2007, there was a further hearing relating to M's divorce petition before the Seville Court of First Instance. On application by F that the courts in the UK were in fact competent (and not those of Spain), the Seville court decided to 'abstain from hearing' the divorce proceedings brought by M 'due to lack of international competence'. It is believed that M did not seek to appeal that order.

[18] In May 2007, an attempt was made to serve M with the order of Deputy District Judge Sheldrake. That was unsuccessful.

[19] By application issued on 6 June 2007, F applied to adjourn the hearing on 8 June 2007 on the basis that M had not been served with the order of Deputy District Judge Sheldrake and, therefore, did not have notice of the hearing.

[20] On 6 June 2007, various orders, without attendance from either party but upon the court reading a letter from F's solicitors, were made by District

Judge Roberts. The matter was adjourned until 14 August 2007 and it was directed that the court was to serve a copy of the order and the application dated 8 February 2007 on M. Those orders of District Judge Roberts were served on M through her legal representatives in Spain in June or July 2007. F then travelled to Spain and had further contact with H in June 2007.

[21] On 13 August 2007, F's solicitor, Miss Anne-Marie Hutchinson of Messrs Dawson Cornwell was telephoned by M. M said that she would 'not [be] coming to court' on 14 August 2008 and that her lawyers in Spain had advised her to ignore the hearing.

[22] On 14 August 2007, District Judge Green made a number of orders, in the absence of M attending, (though being satisfied that she knew of the hearing). They included listing the matter for consideration of F's applications for declarations as to parental responsibility and habitual residence on 13 September 2007, and ordering M to attend that hearing (supported by a penal notice).

[23] On 3 September 2007, F's Spanish lawyers made an application for 'the immediate resumption without further delay of these proceedings for the return of a child'.

[24] On 13 September 2007, Coleridge J made declarations that F had parental responsibility for H and that he was habitually resident in the UK and directed that F could disclose papers filed in the proceedings to the Home Office to assist in his application to vary his leave to remain in the country.

[25] The Hague Convention proceedings made slow progress in Spain. In part this appears to have been caused by M making an allegation against F that he was a fundamentalist: an allegation which was investigated by the criminal authorities in Spain resulting in the complaint being dropped by the Criminal Investigation Court in Seville as not constituting any offence. F's Spanish lawyer describes M's complaint as a malicious delaying tactic.

[26] Eventually, the final hearing of the Hague Convention proceedings in Spain came before the Court of First Instance in Seville on, it appears, 23 and 24 April 2008. On 24 April 2008, the court decided that, pursuant to Art 13(b) of the Hague Convention, it would not order the return of H to the UK.

[27] The material reasoning of the Spanish court was as follows:

> 'From the documentation in the dossier … there is inference of the excellent situation of the minor and her settling in and adaptation to the new environment in Spain, along with the positive and gratifying relationship which she has with her mother, a relationship necessary for her appropriate and proper development in all aspects, especially at this time, given her age and the stage of formation of her personality; due to all of the aforesaid, given the current situation of the little girl and her parents, living in different countries, who do not have plans to live together and who have plans to continue the lifestyle and place of residence (Seville and London) that they currently have, along with the support of the extended maternal family, it can be understood that the return to the father, depriving the girl of her relationship with her mother, a reference attachment figure, and a normalised and stable family situation, entails a physical risk for H and consequently, the hypothesis upheld in the aforementioned articles of the quoted Convention being met, it is appropriate to refuse [a return].'

[28] The papers in the Spanish Hague Convention proceedings were received by the Central Authority in this country on or around 18 June 2008, with a covering letter dated 6 June 2008. They were then forwarded to F. This court is entitled to comment with the greatest respect to its international colleagues that:

(a) the reasoning for the establishment of an Art 13(b) defence formulated by the Spanish court is very shortly argued and is accordingly difficult to discern but on its plain meaning it falls far short of that which would be permitted to establish the same ground in this jurisdiction and appears to confuse settlement with an Art 13(b) defence;

(b) the delay of more than 18 months is inexplicable having regard to the clear timetable set out in Art 11(3) of Brussels II Revised for compliance by national courts and having regard to recent authorities in the European Court of Human Rights appears to constitute a prima facie breach of the child's and F's rights under Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention):

In *Iosub Caras v Romania* (Application No 7198/04) [2007] 1 FLR 661 there was a delay of 18 months from the date of the application under the Hague Convention to the date of determination. That was found by the European Court of Human Rights to constitute a breach of the positive obligation on a State by Art 8 of the European Convention. As stated at paras [38]–[40]:

> '[38] In matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation, such cases requiring urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them (see *Ignaccolo-Zenide*, at para 102, and *Nuutinen*, at para 110). Indeed, Art 11 of the Hague Convention imposes a 6 week time limited for the required decision, failing which the decision body may be requested to give reasons for the delay. Despite this recognised urgency, in the instance case a period of more than 18 months elapsed from the date on which the first applicant lodged his request for the return of the child to the date of the final decision. No satisfactory explanation was put forward by the Government for this delay.
> [39] It follows that the time it took for the courts to adopt the final decision in the present case failed to meet the urgency of the situation.
> [40] Based on its conclusions reached at paras [36] and [39], above, and notwithstanding the respondent States' margin of appreciation in the matter, the court concludes that the Romanian authorities failed to fulfil their positive obligations under Art 8 of the European Convention. There has accordingly been a violation of that Article on this account.'

In *Carlson v Switzerland* (Application No 49492/06) (unreported) 6 November 2008, a judgment of the European Court of Human Rights, the

ECHR found that the Swiss authorities had breached the father's right to family life under Art 8 of the European Convention on the basis of delay and other procedural errors in the determination of the father's application under the Hague Convention. The court (inter alia) noted that speed was essential in return proceedings, in order to restore the status quo ante to prevent any legal consolidation of wrongful acts and to ensure that substantive questions of custody were left to the authorities of the child's State of habitual residence.

The history of the Brussels II Revised proceedings

[29] By an application dated 12 September 2008, F sought an order pursuant to Art 11(7) of Brussels II Revised for the return of H to the UK from Spain, supported by an affidavit of Miss Anne-Marie Hutchinson dated 11 September 2008.

[30] This matter first came before the court on 16 September 2008 (on a without notice basis) before Mrs Judith Rowe QC sitting as a deputy High Court judge. Directions were made on that occasion ordering: (a) M to attend at a directions hearing listed on 10 October 2008; and (b) M to file and serve an affidavit by 3 October 2008 directed at certain defined issues.

[31] On 10 October 2008 the matter came before Her Honour Judge Cahill sitting as a deputy High Court judge who recorded that M was appropriately served with the order of 16 September 2008 'on or about 23 September 2008 in the Kingdom of Spain'. Further directions were thereafter given extending time for M to comply with the direction relating to filing for an affidavit and listing the matter for a further directions hearing on 6 November 2008.

[32] On 6 November 2008, the matter came before Charles J who gave further detailed case management directions in particular as to service on M.

[33] Thereafter the matter came before Hogg J on 26 February 2009 who joined H as a party, listed the matter for a further directions hearing and final hearing on 27 April 2009 and requested that 'the Spanish courts urgently … renew their efforts to serve the mother with the documents in these proceedings (including this Order)'.

[34] On 27 March 2009, the matter came before Roderic Wood J who gave various directions including determining that service by email on M would be appropriate and giving permission for contact to be made with the office of Thorpe LJ, the Head of International Family Law and the International Liaison Judge for England and Wales.

[35] The matter was last before the court at a hearing by Singer J on 27 April 2009.

Service of the documents on the mother

[36] There have been a considerable number of attempts to serve M with various documents in these proceedings. It appears quite clear that M does not wish to engage with these proceedings and has been refusing to be served and/or has evaded service. The following is a non-exhaustive summary of the recent attempts to serve M.

[37] The Court of First Instance in Seville recorded on 14 April 2009 that:

> '… having had contact via telephone with the household where [M is], her sister has informed of the fact that [M] is currently at work, but that

> she will contact her and tell her to come to this Court in order to collect the documents sent from the United Kingdom.'

[38] On 27 April 2009, the same court recorded that:

> 'Not having been able to comply with the rogatory letter as the person to be summoned has not collected the bureaufax. Be the legal aid actions sent back to the Court by recorded delivery, it serving as letter of transmittal.'

[39] On 9 April 2009, the guardian emailed M introducing herself and setting out her role.

[40] On 22 April 2009, the then solicitor for H telephoned M's solicitor with the assistance of a Spanish speaking worker and spoke to M's solicitor and thereafter wrote to M's solicitor on 23 April 2009.

[41] By letter dated 16 June 2009, the solicitors for F wrote enclosing a large number of documents to M, M's mother, and M's Spanish solicitor.

[42] The solicitor for H further wrote to M's Spanish solicitor in Spanish by letter dated 14 July 2009 setting out in detail the background to the proceedings and the guardian's role. The letter's content was approved by a judge of this court but there was no response.

[43] On 23 July 2009, the solicitors for F wrote again (in Spanish) to M's Spanish solicitor and M, couriering the documents to them.

International judicial co-operation

[44] Thorpe LJ's office have now established communication about the case with Spain's Senior Judicial Representative The Honourable Judge Francisco Javier Forcada Miranda and there has been an indication that further assistance may be available.

Legal principles

[45] By recitals 17 and 18 of Brussels II Revised it is provided that:

> '(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. *However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.*
> (18) *Where a court has decided not to return a child on the basis of Article 13 of the 1980 Hague Convention, it should inform the court having jurisdiction or central authority in the Member State where the child was habitually resident prior to the wrongful removal or retention.*

Unless the court in the latter Member State has been seised, this court or the central authority should notify the parties. This obligation should not prevent the central authority from also notifying the relevant public authorities in accordance with national law.' (Emphasis added)

[46] Within the main text of the Regulation, Art 8 of Brussels II Revised, (which of course has direct effect), and now displaces in toto the previous position as to jurisdiction, sets out the general jurisdictional rules as to matters relating to parental responsibility. That rule is subject to Arts 9, 10 and 12: see Art 8(2). Article 10 of Brussels II Revised sets out the jurisdictional basis in respect of child abduction matters. For the purposes of this case, Art 10 is critical, it providing in short that jurisdiction does not pass for the purposes of these proceedings (and in this case to the Spanish courts) until (by virtue of Art 10(b)(iv)) 'a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention'.

[47] By Art 11(6), (7), and (8) of Brussels II Revised it is provided that:

'6 If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non return order.

7 Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties the court or the central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8 Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, *any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with section 4 of Chapter III below in order to secure the return of the child*.' (Emphasis added).

[48] As to the question of when a court can be said to be seised, the relevant part of Art 16 of Brussels II Revised provides that:

'1 A court shall be deemed to be seised—

(a) 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; …'

[49] Article 55 of Brussels II Revised is also material to this case. That provides:

> 'The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, co-operate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to—
>
> (a) collect and exchange information—
>
> (i) on the situation of the child;
> (ii) on any procedures under way; or
> (iii) on decisions taken concerning the child;
>
> (b) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child;
> (c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15;
> (d) provide such information and assistance as is needed by courts to apply Article 56; and
> (e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross border co-operation to this end.'

[50] The application of these somewhat difficult and relatively novel provisions has seemingly been considered in this country in only five reported cases: *Re A (Custody Decision after Maltese Non-Return Order)* [2006] EWHC 3397 (Fam), [2007] 1 FLR 1923; *Re ML and AL (Children) (Contact Order*: *Brussels II Regulation)* [2006] EWHC 3631 (Fam), [2006] All ER (D) 433 (Nov), a decision of Mr Nicholas Mostyn QC sitting as a deputy High Court judge; *Re A; HA v MB (Brussels II Revised: Article 11(7) Application)* [2007] EWHC 2016, [2008] 1 FLR 289; *Re RC and BC (Child Abduction) (Brussels II Revised*: *Art 11(7))* [2009] 1 FLR 574; and *Re RD (Child Abduction) (Brussels II Revised*: *Arts 11(7) and 19),* [2009] 1 FLR 586.

[51] *Re A (Custody Decision after Maltese Non-Return Order)*, concerned a child who was 12 years old and who had been retained by his father in Gozo after what was supposed to be about a 2-week holiday. The left behind mother instituted proceedings promptly after the retention but, after a hearing at which oral evidence was given, a return order was refused on the basis of Art 13(b) of the Hague Convention. Shortly after that refusal, the mother applied in this country pursuant to Art 11 of Brussels II Revised for the court to consider the question of the custody of the child and for consideration of whether the court should order the return of the child forthwith. Having

considered the matter on a broader welfare basis and the welfare checklist set out at s 1(3) of the Children Act 1989 (see paras [95]–[96]), and having heard oral evidence from the mother, her new husband, the mother's younger sister, the maternal grandmother, Singer J ordered that the child should live with his mother, that he should be returned to this country to achieve that end, that the child be made a ward of court, and that the 'judgment' was to be enforceable forthwith in accordance with Art 42(1) of Brussels II Revised.

[52] *Re A; HA v MB (Brussels II Revised: Article 11(7) Application)*, concerned a 2-year-old boy whose father was a Palestinian national and whose mother was a French national. The parties married in London. When the child was 2 months old, the mother and the child went to France to visit her family. When she returned from France in August 2005, without, it seems, the child, she told the father that she wished to end the marriage. She proposed that the father should see the child for fortnightly supervised contact in France. In September 2005, the mother initiated divorce proceedings in the Tribunal de Grande Instance at Vannes in France. In October 2005, the father initiated Hague Convention proceedings. At the final hearing of those proceedings in July 2006 the French court refused the child's return on the basis of Art 13(b). On 18 October 2006, the father initiated proceedings in the Principal Registry seeking an Art 11(7) examination of the child's custody, and seeking a residence order and a specific issue order. On 14, 15 and 28 June 2007, Singer J heard evidence from the mother, the father and the children's guardian and heard submissions and handed down judgment on 24 August 2007. It is plain that there was accordingly considerable delay between the father first seeking a return to the UK by virtue of the Hague Convention and Singer J's final determination of the Art 11(7) point. That said, on the facts of that case, Singer J found that he could indeed make orders as to contact on the basis that even if he were not to order the child's return to England, the court's jurisdiction remained validly seised: see, importantly, paras [87]–[94].

[53] *Re ML and AL (Children) (Contact Order*: *Brussels II Regulation)* concerned a cross border dispute between a father in this jurisdiction and a mother in Austria. The mother failed to engage with the English proceedings with the consequence that the court lacked evidence from her. Mr Nicholas Mostyn QC sitting as a deputy High Court judge made a final order affording contact to the father that was 'reasonable [and] unsupervised in England, Greece or Austria', and left the mechanics and the implementation of that order (which was directly enforceable under the terms of Brussels II Revised) to the Austrian courts which thereafter were properly seised in accordance with the Regulation: see in particular paras [7]–[22].

[54] *Re RD (Child Abduction) (Brussels II Revised*: *Arts 11(7) and 19),* [2009] 1 FLR 586 concerned the wrongful removal of a child by his mother to Portugal from this jurisdiction. The father initiated Hague Convention proceedings but there was some considerable delay in determining the application. The Portuguese court refused to order a return on the basis of Art 12(2) of the Hague Convention. The father thereafter applied under Art 11(7) of Brussels II Revised. Singer J dismissed his application on the principal basis that because the non-return order was made under Art 12(2) there was no jurisdiction under Art 11(7) to order a return to this jurisdiction as such a mechanism only applied to non-return orders under Art 13.

[55] *Re RC and BL* [2009] 1 FLR 574 is another case where Singer J struck out the application made by the mother under Art 11(7) of Brussels II Revised finding that this trumping provision could only be applied to non-return orders under Art 13 and could not, as was the case there, be invoked in respect of a non-return pursuant to Art 3 of the Hague Convention.
[56] As between F and the child's representatives there is no dispute as to the law. This court retains jurisdiction to make the welfare order requested of it by F. Until such time as that application is determined jurisdiction is not ceded to the Spanish courts. The fact of delay which is not the fault of F or the child does not render this court's jurisdiction of only technical effect. Far from it, there is a need for a welfare decision as soon as possible and the present impasse simply avoids answering the key question which arises: is it in the best interests of H for contact with F to be resumed?

Formulation
[57] The considerable delay since F last had contact would ordinarily be detrimental to the child's welfare and her relationship with F. The refusal of the Spanish courts to order a return to the jurisdiction of habitual residence is difficult to comprehend by reference to Hague Convention principles. F is entitled to invoke Arts 11(6) and (7) of Brussels II Revised in this jurisdiction. He has used every known method to serve M and to try and engage her in these proceedings. The delay is not acceptable.
[58] There is no welfare determination of a Spanish or UK court concerning H. Having regard to general principles regarding the exercise of parental responsibility and the upbringing of children by separated parents, absent any adverse welfare information, the courts in this jurisdiction would seek to facilitate shared residence arrangements or direct and meaningful contact for the absent parent and the child.
[59] There is no adverse information about F. It follows that this court is likely to make an order as asked for direct contact unless M engages in the process and provides information about the welfare of the child. I shall adjourn the proceedings of this court, strictly reserved to me, to enable M to engage with the court and provide the usual welfare information to the court and the guardian. If she chooses not to do so she cannot complain if this court makes an order in her absence. I shall request the international liaison judges and Central Authorities to assist in whatever way they can to effect service upon M and to facilitate an effective hearing before these courts on the next and final adjourned date.

Order accordingly.

Solicitors: *Dawson Cornwell* for the applicant
Cafcass Legal for the second respondent

PHILIPPA JOHNSON
Law Reporter