

Case No: FD12P02046

Neutral Citation Number: [2013] EWHC 88 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2013

Before:

MRS JUSTICE THEIS DBE

Jones, Re

Mr Henry Setright QC & Mr Edward Devereux (instructed by **Dawson Cornwell Solicitors**) for the **Father**
Mr Christopher Hames (instructed by the **Bar Pro Bono Unit**) for the **Mother**
Mr Mike Hinchliffe (Cafcass Legal) for the **Children's Guardian**

Hearing dates: 16th January 2013

Judgment

Mrs Justice Theis DBE:

1. This matter was first listed before me on 9 November 2012 following a hearing in the Court of Appeal on 7 November 2012. It was listed before me for the purposes of enforcement of the order made by Mr Justice Hedley on 9 October 2012 for the return of two children, Jessica born 1 January 1998, now 15 years, and Tomas born 10 October 2000, now 13 years, to Spain, where they have effectively lived all their lives. The matter has returned back to me six times since that hearing.
2. The return order was sought by their father, following the unlawful retention of Jessica, Tomas and their three siblings (Sara 16, Eva 10 and David 8) in this jurisdiction by their mother. This is not the first time this has happened. In 2009 there were contested proceedings under the Hague Convention that went to the Court of Appeal. Those proceedings meant the children remained in a state of some uncertainty until their mother finally complied with court orders and returned them to Spain, some 6 months after she should have done.
3. The issues I have been asked to determine are as follows:
 - (i) What further steps should be taken to enforce the order made by Mr Justice Hedley on 9 October 2012 for Jessica and Tomas's return to the Kingdom of Spain.
 - (ii) Whether I should grant a stay on the order for their return.
4. The parties' positions can be summarised as follows:
 - (i) The father seeks an order requiring the mother to take all practicable and reasonable steps to encourage, persuade and facilitate the children to return to Spain. If that is not granted, he proposes he comes over to spend time with the children in this jurisdiction. On either of these scenarios the return order remains in place. He objects to any stay being granted.
 - (ii) The mother does not support an order being made against her as sought by the father. She seeks an indefinite stay on the order for return being enforced.
 - (iii) On behalf of Jessica and Tomas their guardian Mr Mellor does not support an order directed against the mother and seeks a stay on the order for return being enforced until July 2013.
5. In this highly unusual case I consider it appropriate to set out the order dated 9 November 2012, to ensure anyone who reads this report is aware of the restrictions that remain in place:

'For the avoidance of doubt, and until further order to the contrary, section 12 of the Administration of Justice Act 1960 shall not apply and accordingly the media may report any information relating to these proceedings and to the two children Jessica (dob 1.1.98) and Tomas (dob 10.1.00) and may publish any photographs which are already in the public domain save that they shall not publish information as to where the children are currently living and/or the schools at which they are attending.'

Background

6. I shall set out the background relatively briefly. It has already been extensively covered by a number of judges in previous hearings (Sir Mark Potter and the Court of Appeal in the previous Hague Convention proceedings in 2008 and 2009; Mr Justice Hedley on 9 October 2012 and Mr Justice Roderic Wood on 15 and 19 October 2012).
7. The father is 52 and was born in Spain. He is a Spanish national and a Lieutenant-Colonel in the Spanish army. He lives, as a result of his work, in Mallorca, Spain. The mother is 45 and was born in Wales. She is currently living in Carmarthenshire, is a school teacher and lives with her partner Mr Williams.
8. The mother and father married on 20 May 1995 in Spain. From 2001 to 2008 they lived in Catalonia. They purchased a property there in 2006. In August 2007 the family travelled to Wales so the mother and children could spend a year in Wales whilst the parties' house in Spain was being renovated, under the supervision of the father. In June 2008 the father travelled to Wales and returned to Spain with the children in August 2008. The mother followed shortly afterwards and the children were placed in Spanish schools.
9. On 15 October 2008 the mother removed the children from Spain with the father's consent. Once in Wales with the children the mother commenced proceedings under the Children Act 1989. On 26 November 2008 the father issued an originating summons seeking a return order, pursuant to the provisions of the 1980 Hague Convention and Council Regulation (EC) No 2201/2003 (Brussels IIR). Following contested proceedings by order dated 27 March 2009 the President ordered the children to return to Spain forthwith. The mother appealed, the Court of Appeal granted permission but dismissed the appeal. The children returned to Spain with the mother in April 2009.
10. There were contested welfare proceedings regarding the children in Spain in the relevant court seised of the domestic proceedings in Lleida, these culminated in an order being made on 30 December 2009. That court ordered the children were to be in the sole custody of the father with contact to the mother. The Spanish court, in its judgment, drew attention to what it considered to be the mother's influence on the children and her inability to be positive about the father.
11. The children spent time with the mother in Wales during Easter 2010 and in the summer later that year. The mother threatened to retain the children after the summer holiday, with the result that the father's sister had to travel to Wales to pick up the children to take them back to Spain. There was no contact at Christmas 2010 or Easter 2011. By June 2011 the mother had moved permanently to Wales.
12. In June 2011 the mother applied through the International Child Abduction and Contact Unit (ICACU) to request the registration and enforcement of an existing court order and to make a request for contact. Thereafter there was contact in Wales at Christmas 2011 and Easter 2012. During the Easter holidays the children were visited by Marek Ganther of Children and Families Across Borders (CFAB), he contacted

- Carmarthenshire CC (LA), they decided to take no further action as the Spanish Social Services had already investigated the allegations made by the mother.
13. On 23 June 2012 the children travelled to Wales from Spain for a summer holiday, they were due to be returned on 2 August 2012. The mother visited the LA on 27 June 2012 and made allegations against the father. By email to the father on 2 August 2012 the mother indicated she was not going to return the children.
 14. The ICACU instructed solicitors for the father and on 22 August 2012 an application was made for a location order. That was granted by Miss J Crowley Q.C. (sitting as a Deputy High Court Judge) on 29 August 2012 who made Sara a ward of court. The matter came back before Mrs Justice Hogg on 5 September 2012. The mother was represented. She filed a notice on 11 September 2012 that she intended to act in person. The matter came before Miss D Eaton Q.C. (sitting as a Deputy High Court Judge) on 13 September 2012. Sara was joined as a party and permitted to return to Spain accompanied by her paternal aunts. Further directions were given, including the instruction of CAFCASS CYMRU, and the matter was listed for final hearing on 8 October 2012.
 15. Mr Justice Hedley heard the matter on 8 October 2012 and gave judgment on 9 October 2012. He granted the father's application that the younger four children should return to Spain. He ordered the mother to hand over the children to the father at 4pm on 12 October 2012 at Cardiff Railway Station and the children were to be returned to Spain by midnight that day. Those orders were supported by a penal notice directed to the mother.
 16. The mother did not attend with the children at the railway station, she informed her counsel by telephone she was not going to attend. The father made an application to the out of hours judge who ordered the mother to attend court on Monday 15 October 2012 at 2pm.
 17. The mother attended court and was represented by Mr Hames. The mother sought to set aside and/or stay the orders of Mr Justice Hedley on the basis of what was said to be fresh evidence of the children's objections (see paragraphs 2, 16 and 20 of the judgment dated 15 October 2012) and joining Jessica and Tomas as parties. Mr Justice Roderic Wood rejected all those applications, he made return orders requiring the children to be immediately returned to the jurisdiction of Spain, requested the local social services department and police force to assist in bringing about a return and made a collection order.
 18. Unfortunately the collection order was not sought to be enforced until the early hours of 16 October 2012. When the police attended the mother's property the children were not there. The mother and Mr Williams had absconded with the children.
 19. On 16 October 2012 Mr Justice Roderic Wood made further orders and at 2pm made a short statement to the press, asking for assistance in locating the children and released a number of photographs. Following extensive media coverage the mother, her partner and the children were located on 17 October 2012. The mother and her partner were arrested and the children placed with LA foster carers.

20. On 18 October 2012 the father and Sara travelled from Spain to pick the children up and return them to Spain on a flight at 2.15pm. The detailed case recording of the social worker sets out what happened, subsequently described in the Court of Appeal as a '*sad scene*'. In essence, Jessica and Tomas refused to go. The father, Sara, Eva and David returned to Spain.
21. The mother's partner, Mr Williams, was discharged from custody. The mother was taken in custody to London where she appeared before Mr Justice Roderic Wood at 2pm. Mr Justice Roderic Wood discharged her from custody and gave a short judgment indicating that he was disclosing the papers to the Attorney General for him to decide whether proceedings for contempt should be instigated. The court then sat in private. The hearing continued into the next day and judgment was given on 19 October 2012. In relation to the various applications before him he refused the application to join Jessica and Tomas as parties, refused permission to appeal such refusal, directed the LA to accommodate Jessica and Tomas pursuant to section 5 Child Abduction and Custody Act 1985. He stayed the return orders until 29 October 2012 and made consequential orders in anticipation that the mother and/or Jessica and Tomas would appeal. Jessica and Tomas were placed with foster carers where they remained for six weeks until 1 December 2012.
22. On 30 October 2012 the relevant court in Spain dismissed the mother's application for custody to be transferred to her and the father's application to vary the arrangements for contact and confirmed the order made on 30 December 2009 remained effective, both as to custody and contact. A translation of the reasoned judgment is in the papers.
23. The mother, Jessica and Tomas applied for permission to appeal the orders made on 19 October 2012. Those applications were all dismissed on 7 November 2012. The Court of Appeal indicated that the return order made by Mr Justice Hedley should come back before the High Court for the purposes of enforcement and as part of that process a Judge of the Division should speak with the children, strictly limited to explaining to them the basis of the decision made by Mr Justice Hedley and informing them of the obligation of the court to return them to Spain.
24. The matter was first listed before me on 9 November 2012. The mother was in person as Mr Hames was unable to attend the hearing. Directions were made with a view to the matter returning the following week to enable Jessica and Tomas to come and see me. After hearing submissions on the morning on the 15 November I saw Jessica and Tomas with two social workers from the LA. A note of that meeting is in the papers. They expressed their views about returning to Spain and I explained to them the orders that were in place and the need for them to be complied with. One matter that became clearer at that meeting was that they were in regular telephone contact with their siblings, in particular Eva and David and it was obvious they had a warm and close relationship with them and missed them.
25. At that hearing, despite indicating to the contrary in the written submissions on her behalf submitted by Mr Hames, the mother said, in effect, she was not going to accompany Jessica and Tomas back to Spain. The plan following that hearing was that the father would come over to see Jessica and Tomas and spend some time with them and the matter was restored back to court the following Thursday. The father and Sara arrived on the Monday and had contact for the next three days. The contact

notes report a growing warmth in the relationship between Jessica and Tomas and their father. It became less and less supervised; the contact on the Wednesday went very well with the children agreeing to extend it. The notes were particularly striking in describing the growing warmth between Tomas and his father. He said to the social worker on the way home from the Wednesday contact that the contact was fun and that '*he was very confused*'. Jessica said she had enjoyed the contact, she felt bad that she didn't want to hurt her father but it had not changed her mind and she will not return to Spain. The social worker considered both of them presented as being very confused.

26. The matter came back before me on 22 November 2012 when the court endorsed a plan put forward by the father that he was going to bring Jessica and Tomas up to London the following day for the weekend. This was so he could continue to restore his relationship with Jessica and Tomas and take them to what was described as a more neutral environment. The matter was to be restored back to me the following Tuesday, and Jessica and Tomas were going to attend court.
27. When Jessica and Tomas were informed of the plan the following day they reacted in different ways. Jessica is reported as saying instantly that she did not want to go to London and did not want to spend the weekend with her father. When the social worker explained the arrangements Tomas asked what they would be doing in London. She noted that Tomas did not initially refuse to go, however after Jessica stated that she would definitely not go Tomas said he did not want to go. When they got back to the foster carers Jessica remained resolute in her position that she did not want to go whereas Tomas asked what they would do in London. It appeared that Tomas was considering going but then followed Jessica after she re-stated her refusal to go. The social worker raised the question of contact with the father in Wales; Tomas said yes but later changed his mind when Jessica informed him that he would not be able to change his mind once he had decided. It was agreed that they would see their father with an interpreter that afternoon for a meal. The social worker dropped the children at the restaurant at 1.30. One of the social workers was contacted by the interpreter just after 2 and they returned to the restaurant. Jessica, Tomas and the interpreter were waiting in the car park. The father was about 40 metres away. The children were upset and wanted to leave. The interpreter reported that the situation in the restaurant had escalated when the children said they did not want to go to London. The father became angry and started shouting and Sara and Jessica were crying. The children reported that the father had said that he was giving up on them and 'throwing the towel in'. On their way back to the foster carers Jessica remembered she had a toy she wanted Sara to give Eva. They returned to the car park and went to give the toy to Sara. The father was shouting at the children and appeared very angry. The children reported that the father had said he was returning to Spain that night. The father and Sara returned to Spain. That was the last time Jessica and Tomas saw their father and older sister.
28. The court was made aware of the position late on the Friday afternoon, 23 November 2012, and I made a holding order for the weekend. The LA indicated that their position at the next hearing was that the section 5 order should be discharged and Jessica and Tomas returned to the care of their mother.

29. The matter returned back before me on Tuesday 27 November 2012. Having listened to submissions I decided that John Mellor, an experienced member of the High Court Cafcass team, should go and see Jessica and Tomas. Arrangements were put in place for him to do so on 29 November 2012 and a document drawn up setting out the purpose of the interview, summarising the options and consequences. The matter was listed back before me on 30 November 2012 for Mr Mellor to give oral evidence.
30. In considering the question of Mr Mellor's involvement I had to determine the question of whether the case should be accepted by the Cafcass High Court Team in London or CAFCASS CYMRU. I decided it should be the former. The Children Act 2004 (CA 2004) established the Welsh Assembly (CAFCASS CYMRU) as a separate body which took over the principal functions of Cafcass (as set out in section 12 Criminal Justice and Court Services Act 2000 (CJCSA 2000) as amended by the Children Act 2004) in Wales. According to section 35 CA 2004 this was only in relation to children '*ordinarily resident in Wales*' which it was agreed Jessica and Tomas were not. For the hearing on 16 January 2013 Mr Hinchliffe helpfully submitted an agreed document setting out the position. It is common ground now that there is a difficulty with the current practice on allocation as between Cafcass and CAFCASS CYMRU of 1980 Hague cases. Up to now this has been governed by the Practice Note issued jointly in 2006, with the approval of the President, by Cafcass and the National Assembly for Wales (CAFCASS CYMRU). Para 9 states that 1980 Hague cases where the child is "*usually resident*" in Wales will be referred to CAFCASS CYMRU. Mr Hinchliffe submits those drafting the legislation and the Practice Note were under the impression that children "*ordinarily resident*" in Wales included children the subject of 1980 Hague proceedings who had been abducted to, or retained in, Wales. He submits it now appears this was a misapprehension and that such children are not ordinarily resident in Wales and so cannot come within the CA 2004, but do come within the CJCSA 2000. In other words, 1980 Hague cases in Wales ought properly to be referred to Cafcass, in the person of the service manager of the High Court Team, when a report on child's objections or on settlement, or representation by a children's guardian or some similar function, is required by the court. None of this affects the other functions set out in the Practice Note, which is currently under review. I agree with that analysis.
31. Mr Mellor's evidence on 30th November was detailed, powerful and clear. He had seen Jessica and Tomas separately and together, he had spent over 2 1/2 hours with them. What he described in his evidence as the 'headlines' were that both of them said there was no way they are going [to Spain] and that no one is going to prevail upon them to return on any of the scenarios that are available. He described them as being insistent and that they will resist to the utmost. They agree that if it were possible to participate in the Spanish proceedings from this country they would do so. He reported that both were anxious for things to be sorted out '*but on their terms*'. Mr Mellor set out his view that however they have come to think and feel the way they do he saw '*no prospect of anyone prevailing upon them at this stage, in their current frame of mind, to comply with the orders made for their return*'. He described the resistance shown as being '*exceptional*' in his experience. In answer to questions from Mr Setright Q.C. he confirmed his view that he could see some benefits in Jessica and Tomas being returned to the care of their mother, as he could see no purpose in them continuing to be placed with the foster carers. Following that evidence I determined the mother's application for Jessica and Tomas to be returned to her care. That

application was supported by the LA and not actively opposed by the father who saw the force of Mr Mellor's rationale for his opinion. I discharged the section 5 order and Jessica and Tomas returned to their mother's care the following day.

32. The matter returned for further directions on 14 December 2012 when I directed a hearing to take place on 16 January 2013 to consider (i) any further mechanism for the enforcement of the order of Mr Justice Hedley dated 9 October 2012 and (ii) the mother's application to stay the return order. The father was directed to file a position statement setting out his proposals for enforcement of the order and the mother to respond. Arrangements were made for Mr Mellor to see Jessica and Tomas on 8th January and to file a report the following day. The order recorded the purpose of that interview was to '*assist the court with what further steps can or should be taken to implement the order for Jessica and Tomas to return to Spain and, whether, depending on those steps Jessica and Tomas should be represented within this process*'.
33. The father's position statement invited the court to make an in personam injunction against the mother requiring her to return Jessica and Tomas to Spain. The report filed by Mr Mellor, following his meeting on 8 January, showed no change in Jessica and Tomas' position, he described them as being '*steadfast*' in their refusal and determined to resist any effort to enforce the return order. His view was that in their present frame of mind it was '*extremely unlikely*' that they could be prevailed upon to return to Spain. In his experience he regarded this as being a very difficult position for them and '*very unusual*'. He concluded that they should be joined as parties and for him to be appointed as their guardian so that he and they have the benefit of legal representation fully to articulate their case. He confirmed there was no difference between the children's stated wishes and his professional opinion of the situation.
34. I listed the application for Jessica and Tomas to be joined as parties on 14 January 2013. The father 'opposed' the application but it was understood that there had only been very limited time to consider this issue with the father. I refused the request on his behalf to delay determining that application until the morning of the hearing listed two days later. Having considered the criteria set out in paragraph 7.2 PD16A Family Procedure Rules 2010 I concluded that Jessica and Tomas should be joined as parties. The most persuasive factor for me was that Mr Mellor's opinion, which I accepted, was that they should be parties so they could fully articulate their case. Other features I considered relevant were that due to the position of the parents I considered the court would benefit in having separate representations made on behalf of Jessica and Tomas and it was clear they were opposed to the course of action proposed by the father.
35. The following day the court received written submissions on behalf of Sara that she had concluded, for the reasons outlined in those submissions, that her remaining a party was unlikely to assist the process. She was concerned about the implications for relationships within the family if she remained a party. There was no opposition to her application to cease to be a party and I dealt with that as a paper application.
36. At the hearing on 16 January I had the benefit of the written submissions on behalf of all parties, including those submitted in writing on behalf of Sara, supplemented by detailed oral submissions. I reserved judgment.

Submissions of the parties and discussion

37. Before setting out my decision I would like to express my gratitude to all advocates. The court has had the benefit of detailed submissions, both oral and written of the highest standard. This particularly applies to Mr Hames who has represented the mother pro bono and has done so with enormous skill. The court is extremely grateful to the LA who provided both Jessica and Tomas with enormous support in a situation that was not of their own making. The LA solicitor Mr Jones and the team of social workers who supported Jessica and Tomas excelled in the roles they undertook.
38. In reaching my decision I am acutely aware of the underlying policy considerations of The Hague Convention and Brussels II R. These policy considerations include, not only the swift return of abducted children, but also comity between contracting states and respect for one another's judicial processes. The Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. However, I am satisfied that the position the court is faced with here is truly exceptional.
39. The matter was restored back to me, following the Court of Appeal hearing for enforcement of the return order made by Mr Justice Hedley as long ago as 9 October 2012. As the history above recites, various attempts have been made to enforce the order to secure Jessica and Tomas' return to Spain. Those steps have included Jessica and Tomas meeting me, the father and Sara coming here for extended contact and John Mellor (one of the most experienced Cafcass officers in the High Court team with expertise in these cases) going to visit the children on two occasions. The reality is none of those steps have changed the position on the ground.
40. The court is entering somewhat uncharted waters as to what the available options are. In my judgment the harsh reality is that both Jessica and Tomas have been fundamentally let down by their mother by her refusal to comply with the court order requiring them to return to Spain. She has put them in an impossible situation which has resulted in them being physically separated from their siblings, with whom they have always lived and clearly have a close relationship with. Her actions have, in my judgment, fractured those significant relationships to the long term detriment of all the children. Despite the orders in place in the Spanish courts and the attempts by this court and the Court of Appeal, together with undertakings offered by the father to ensure the return would take place with no risk to the mother of further proceedings on her return to Spain she has, wholly unreasonably in my view, refused to exercise her parental responsibility in relation to Jessica and Tomas in such a way that would assist and support them to return to Spain and be re-united with their father and siblings.
41. Mr Setright Q.C., on behalf of the father, acknowledges the difficulty the court is faced with. He submits the mother needs to do all she can to assist to persuade and support the children to return to Spain pursuant to the order. On behalf of the father he invites the court to make an order requiring the mother to return the children to Spain.

He accepts it would not be an immediate return and in the order he submitted to the court during the hearing he sought an order that the mother return the children to Spain by 15 February 2013 and '*shall take all practicable and reasonable steps to encourage, persuade and facilitate the children to return to the jurisdiction of the Kingdom of Spain*' and the current restriction on the mother speaking to the children about these proceedings be lifted to the extent necessary for her to comply with the proposed injunction. He said the objective is not to commit the mother for contempt, he said '*it is not an order that requires an unacceptable level of coercion*' but places the obligation on the mother to persuade the children to go back. He accepts in the situation that exists it is not easy but, he submits, over time she is likely to have influence on these children and the aim of the order sought is to require her to take those steps. The intention behind the order is to '*secure the return not to commit but if the order is not complied with committal must be in the court's armoury*'. He described this as a soft approach with a hard edge. He said if the court declined to make such an order further negotiation and the softer approach can continue. During the hearing the father gave instructions that if the court was not minded to make such an order he will come over to this country for an extended period of time to enable him to spend time with Jessica and Tomas.

42. He submitted there is a responsibility on the Contracting State, in the form of the court, to create the necessary conditions for executing the order, which can include coercive measures against the abducting parent or steps to prepare for the return of the children. He relies on *Ignaccolo-Zenide v Romania No 31679/96 (2001) 31 E.H.R.R. 7 para 105-106* and *H.N. v Poland No 77710/01 (2005) 45 E.H.R.R. 1054 para 75* '*.....the Court considers that the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention..*'. The mother should be given the opportunity to persuade the children to return, with a sanction requiring her to do so. That upholds the rule of law which requires a party to obey orders made by the court and co-operate with the process.
43. Mr Hames, on behalf of the mother, opposes any further enforcement orders. He submits his instructions are the mother will not return to Spain and will not take any steps to return Jessica and Tomas to Spain. His written submissions state '*The sole and plain reason why this order is neither possible nor practical to enforce is because the children have made it neither possible nor practical to enforce*'. The mother's position following the steps she took preventing the implementation of the collection order made by Mr Justice Roderic Wood is the Attorney General is still considering his position in relation to any action he may take against her. Mr Hames' express instructions are that the mother will not take any steps to comply with any order made requiring her to encourage Jessica and Tomas to return to Spain. Up until now she has been prevented by order of this court from discussing these proceedings with them.
44. Mr Hames submits there should be a stay on the enforcement of the return order. He does not seek a limit of time, referring to what he seeks in his submissions as an '*indefinite*' stay rather than a '*permanent*' stay. He submits rule 4.1 (3) (g) Family Procedure Rules 2010 clothes the court with a general power to order a stay. He relies on the editors note in *TB v JB (Abduction Grave Risk of harm) [2001] 2 FLR 515* and the transcript record of that hearing which states '*In the light of the circumstances which have occurred since the date of the orders of 19th December*

2000 and 25th April 2001, it is impractical to return the two children to New Zealand at present and we grant a stay of execution of the two orders on terms that the mother complies [with contact]'. There is no authoritative guidance on the test to be applied to an application for the stay of a return order. Mr Hames submits that the starting point is that the court will try to enforce its own orders. There are cases where the children would simply refuse to board a plane or would create such a disturbance on the plane that the captain would refuse to take them (by way of illustration *Re HB (Abduction Children's Objections)* [1998] 1 FLR 422). He submits the previous attempts at enforcement by this court have not worked. The collection order and subsequent attempts thereafter have failed. In those circumstances, he submits, a stay is a proportionate, realistic and justifiable order. This would acknowledge what the children are saying about the reality and practicality of enforcement (the '*well is dry*') and prevent any '*disorderly*' implementation of the order and would recognise that enforcement at the moment is not '*practical or realistic*'. It would give finality to Jessica and Tomas as it is disproportionate to continue the enforcement process when there is no prospect of effective implementation.

45. Mr Hinchliffe, on behalf of Mr Mellor, Jessica's and Tomas' Guardian, submits that he is not able to support the order being sought by the father as Jessica and Tomas are very clear with him they object to return to Spain. He submits that such an order would practically be impossible to implement at the moment. Since the return order was made there have been at least 10 hearings where the court, as the central authority, has undertaken intensive measures including the children being placed in the care of the Local Authority, having contact with their father, being seen by me and interviewed twice by Mr Mellor in an effort to persuade them to return. Despite those intensive measures Jessica and Tomas have remained unswerving in their views that they do not wish to return to Spain. Both parents have remained resolute in their respective positions and whilst there may be concern regarding the conduct of both parents during this process he submits '*we are where we are*'. The court should not make a further order to achieve what is currently on the evidence impossible. This submission is made in the context where the Guardian would be very pleased if Jessica and Tomas were re-united with their siblings in Spain where it is agreed issues concerning their welfare should be determined. In giving effect to the duty and obligations that arise under The Hague Convention there can be an end point when the court has done all that it can in the circumstances of the case; he submits that has been reached in this case.
46. In making those submissions he prefaces them with a clear statement that Cafcass is committed to The Hague Convention and the underlying principles. But he is faced with an unusual situation here as the children's lawyer tasked with protecting their interests in a Hague case where one starts from the position these children's future is to be determined by the Spanish courts, which has made a final determination as to where and with whom the children should live and has set out a regime for contact.
47. He submitted that Jessica and Tomas should be allowed to complete this academic year here and a stay should be granted until July 2013. He accepted that this was a '*welfare tinged*' argument. He submits there is no realistic prospect of Jessica and Tomas returning in the short term since, even if the mother was committed to prison, from their point of view this unattractive prospect will make no difference to their expressed objections, at present, to returning to Spain. He submitted the Guardian is

very mindful that Jessica and Tomas are part of a sibling group that is now split and the father is trying to keep the family together.

48. He submitted a stay would send out a clear message that there was a period of respite to the enforcement process. That was within the power of this court if the court '*is to have an eye to the welfare of children*', a stay would be a '*breather for these children*' in the very exceptional circumstances of this case. He accepted the decision whether to grant a stay was very finely balanced, but submitted that taking into account welfare it cannot be right to allow the process of enforcement to continue for the time being.
49. Mr Setright Q.C. in response to the stay argument makes a number of points. First, *TB v TJ (ibid)* can be distinguished as it was against a different legal background. It pre-dates Brussels IIR. Brussels IIR now takes precedence over the Hague Convention as regards applications concerning Member States of the Regulation. He submits the whole scheme of the Regulation, in particular Article 11 and the enforcement provisions are incompatible with the notion that any court can circumvent the procedures of the Regulation by granting an indefinite stay. Second, the Spanish court has heard this case in great depth and has ordered a return. There is very limited room for manoeuvre in this jurisdiction whilst that regime remains in place. Comity obliges this court to honour decisions of the Spanish court. A stay would send the wrong message in this case, that this court had given up on its' obligations, in particular under Article 8. In effect the court would be making a welfare decision when it is agreed that is under the exclusive jurisdiction of Spain. Third what is the need for a stay? It is not being suggested that this father is a risk to the children who would take some outlandish direct action that would be damaging to the children. There is no evidence to support such a suggestion from which the children need protection. He submitted that perhaps what lay behind the application is that tactically the mother might want a stay to take the heat off compliance with the orders and by granting a stay that would send the wrong message to the mother and the children. If a stay was being sought pending a specific event, for example the outcome of any appeal process in Spain that application should be made to the Spanish court. Fourthly, any stay is, in effect, a stay on the operation of the Spanish order. To grant such an application would give a wrong message; it would give an indication by this court that the Spanish orders and the order under the Hague Convention that supports it should not be enforced, which is not the function of this court. Fifthly, any suggestion on behalf of the Guardian that Jessica is only a year away from being outside the Hague regime is manipulative and welfare driven, is wrong in principle and is not a basis or justification for a stay. Sixthly the suggestion that a stay will provide a '*breathing space*' ignores the Article 39 procedure and applications to lift the stay. It is therefore equally likely to encourage more litigation.
50. Although Sara does not remain a party I have read the written submissions filed on her behalf by Mr Harrison Q.C. and Ms Wilkins. In relation to the stay Mr Harrison Q.C. submits that this court has no jurisdiction to grant a permanent stay; there is a residual power in the CA to grant a temporary stay. The stay in *TB v JB (ibid)* was given on the third occasion the matter was dealt with by the CA, there was no full judgment, it was done after hearing a wholly unprecedented account of the Tipstaff's attempt to enforce the order of the CA and the court concluded that it could not be implemented. In the second judgment of the CA in the TB case the President observed

that *'the Court of Appeal has the right to revisit its own order for the purpose of enforcement or implementation'* and a little later observes *'There remains a residual power, it seems to me, in the Court of Appeal to deal with some exceptional change of circumstances which might render the order impracticable to enforce, or putting it another way, the implementation impossible of fulfilment.'* He submits that the limited and exceptional power not to implement a return order, which was identified in *TB* was one which vested solely in the CA and not in a Court at first instance. He relies on the observations made by Butler Sloss LJ in *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 *'In the absence of full argument on the point, an application to set aside a return order to return the children under the provisions of the convention should in my view be by way of appeal to the Court of Appeal.'* It is submitted that this approach has been followed since then (see *HB* [1998] 1 FLR 422 and *Re T* [2000] 2 FLR 192).

51. As to the jurisdiction of this court to grant a stay my understanding is, in the light of rule 4.1 (3) (g) Family Procedure Rules 2010, none of the parties who appeared before me on 16 January 2013 took any issue about the jurisdiction to grant a stay. The critical issue for them was whether one should be granted in the circumstances of this case.

Decision

52. Any decision I reach has to be considered in the context that there is no current or prospective challenge by any party to the order requiring the children to return to Spain and it is agreed between the parties that Spain retains the welfare jurisdiction relating to Jessica and Tomas under Brussels II Revised. Accordingly, this court's role is very limited, particularly against the backdrop of the Art 39 procedure for enforcement. All first instance welfare decisions in Spain relating to where the children should live and contact are extant. According to Mr Hames the mother has appealed two orders made by the court in Lleida (one for the immediate return of the children and the second relating to custody) and one made in Mallorca, where the father and children currently reside.
53. Although the decision as to whether there should be a further order directed to the mother is finely balanced I have reached the very clear conclusion that in the particular (and unusual) circumstances of this case I should not make such an order.
54. I have reached that conclusion for the following reasons:

(1) As outlined above the court has taken intensive steps to see if the return order can be implemented. Sadly, none of those have borne fruit although at the time they were made they all had some prospect of success.

(2) There is, in my judgment, very little prospect of the order sought by the father working. That would mean there would very likely be the prospect of a committal application on the horizon which would, in my judgment, further polarise this fractured family with little or no prospect of the underlying purpose of the order being achieved. Both Jessica and Tomas have made their position clear to Mr Mellor (in particular at paragraph 9 of his report dated 10 January 2013) leading him to conclude that *'...in their present frame of mind, it is*

extremely unlikely that Jessica and Tomas can be prevailed upon to return to Spain'. The mother is to be deprecated for the position she takes. She has, in my judgment, abdicated her parental responsibility for these children and she will have to answer to them and their siblings in due course. I do not see her position now in isolation, it has been part of a concerted campaign by her over a number of years to thwart and undermine the legitimate orders made regarding the welfare of these children in Spain. The decision I have reached is in no way determined by her wholly unjustified position, but I cannot ignore it when I consider all the circumstances.

(3) I am acutely aware of the court's obligations under Article 8 (as outlined in *H.N. (ibid)*) and the positive obligations to reunite a parent with his children. However that obligation needs to be considered against the backdrop of the steps that have already been taken and the evaluation the court has undertaken of the further steps proposed in each case. In the circumstances of this case I have reached the conclusion that the reality is the injunction proposed by the father is likely to polarise positions more and is more likely than not to delay any reunification of the children with their father.

(4) In my judgment the father's alternative position is likely to have more prospect of success. Having taken the steps that have been taken what this case needs now is implementation rather than enforcement. That is likely to take time to enable relationships to be restored and provide an opportunity for reflection on the positions being taken. That is not going to take place against the backdrop of an injunction and the prospect of enforcement, by way of committal, of that order being on the horizon.

55. Turning to the application by the mother for a stay of the enforcement of the order requiring Jessica and Tomas to return to Spain I have reached the conclusion that whilst no real issue has been taken that this court probably does have jurisdiction to grant a stay under FPR 2010 r 4.1 (3) (g) I am going to decline to exercise it in this case, either indefinitely (as advocated by the mother) or for a limited period (as advocated by the Guardian).

56. I have reached that conclusion for the following reasons:

(1) I agree with Mr Setright Q.C and Mr Harrison Q.C. that the legal background that exists in this case, militates against granting a stay which could be seen to be circumventing the procedures set out under the Brussels II R regulation. This obviously includes the Article 39 procedure, which is available as of right, although the domestic enforcement armoury remains, in reality, the same.

(2) It is not in issue between the parties in this case that any welfare decisions relating to Jessica and Tomas should be determined in Spain. Comity between the two jurisdictions militates against this court taking any step which could be seen to undermine orders made in the primary jurisdiction.

(3) There is simply no evidence to suggest that this father would take any steps for a '*disorderly*' implementation of the return order. On the contrary, if his

primary submission for an injunction is not permitted he plans to come over to spend some time with the children in this jurisdiction.

(4) It does not inevitably follow that if there are no active steps in place to enforce the return order there should be a stay.

(5) Bearing in mind the limited role this court has at the stage this troubled case has reached, I regard the submission on behalf of the children for a stay to be more than tinged with welfare. The main foundation of the submission seems to me to be their welfare. Whilst I can see the force of the argument it is not one, in the limited role I have, and on the facts of this case I should accede to. It would send the wrong message in relation to the welfare decisions that have been taken in Spain and would have implications regarding the obligations on this court under Article 8.

(6) I do not see the granting of a stay as reducing future litigation. If it is time limited consideration would need to be given as to whether it should be extended. If the parties are able to reach agreement it would require a further application.

(7) I do see an element of tactical manoeuvring behind the mother's application. I have no doubt she will feel that such an order will justify her position but in my judgment it will send entirely the wrong message to the mother and the children.

(8) I specifically reject the submission by Mr Hames that such an order is '*proportionate, realistic and justifiable*'. It is not required or proportionate and lacks any rational or legal justification.

57. Therefore, I reject the application for a stay and accept Mr Setright's submission that in the event that I decline to make the injunction the correct analysis is the return order should remain in place.

58. I will hear submissions from Counsel as to the precise terms of the order that should now remain in place and what adjustments should be made to the current prohibition on the mother speaking to Jessica and Tomas about the details of these proceedings.

59. Whilst this judgment has focussed on the dry legal landscape one cannot ignore the underlying human element to this case. As Mr Mellor observed in his oral evidence he was struck by the observations of Mr Justice Hedley about the role the parents had played, how they had chosen to parent and the damage that they had done to their children. I would echo and associate myself with the astute observations of Mr Justice Hedley, who considered this case in October, when he said

"..the position of the parents is one of complete impossibility. I do not think they begin to even understand, if they care in the slightest, that they carry on their battle with a total disregard for the cost paid by their children for what they are doing. It is deeply saddening and deeply troubling that parents can be quite so unspeakably selfish as to conduct this kind of battle over years and years and stand by and watch their children pay the price of it. That is how they chose to parent and they must answer for it to their own children in the fullness of time."

60. As Mr Mellor commented what he found so troubling is that the parents do not appear to have heeded one word of what Mr Justice Hedley said so we now have this impossible situation. I am deeply concerned about the emotional health of this family, in particular all the children, if the parents continue their past behaviour into the future. I sincerely hope that will change.