J v J (RELINQUISHMENT OF JURISDICTION) [2011] EWHC 3255 (Fam)

Family Division

Mostyn J

28 November 2011

Abduction – BIIR – Father's failure to seek enforcement of English order for return – No prospect of Austrian court ordering return of child – Two siblings separated for 3 months – Whether relinquishment of jurisdiction was in the best interests of the children

Mostyn J gave judgment in September 2010 ordering the return of two children, now aged 6 and 2, to the jurisdiction, and advising the father to register and have the order enforced in the Austrian courts under Art 28(1) of Brussels II Revised (BIIR) (EC No 2201/2003). The father instead took proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980. The Austrian court held that the children were not habitually resident in England and Wales and dismissed his application but ordered contact. During a contact visit in August 2011, the father removed the elder child and brought him to this jurisdiction.

Held – ordering the summary return of the older child to Austria and discharging all existing English orders, subject to the court being satisfied that the father would not be at risk of criminal or civil proceedings being taken against him in Austria for the removal of the child –

(1) The time had come for the court to take decisive action to ensure that an appropriate forum determined the welfare issues in relation to the children. The delay and legal manoeuvring simply could not go on a minute longer (see para [17]).

(2) In the circumstances where the father had not taken the steps he had been advised to do and there was no prospect of the Austrian authorities returning the other child to this jurisdiction, the only step the court could take was to order in the best interests of the elder child that he be returned to Austria, on the basis that Austria was the better place within the terms of Art 15 to determine the children's welfare interests (see paras [18], [19]).

(3) The decision of the court was to relinquish its superior jurisdiction in favour of another EU State and make a welfare-based decision for transfer of children to another EU court. This was done in circumstances where the machinery of BIIR had been ineffective, either because of a failure of the judicial administration in the second State, or because of a failure of one or other party to engage in the machinery. The unprecedented nature of such a decision warranted the grant of leave to appeal to the Court of Appeal (see paras 22–24).

Statutory provisions considered

Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 23, 28

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, Art 15

Cases referred to in judgment

J (Child Returned Abroad: Convention Rights), Re [2005] UKHL 40, [2006] 1 AC 80, [2005] 3 WLR 14, [2005] 2 FLR 802, [2005] 3 All ER 291, HL

Henry Setright QC and *Ruth Kirby* appeared for the applicant
James Turner QC and *Michael Gration* appeared for the respondent

MOSTYN J:

[1] In a speech made not so very long ago, the Master of the Rolls, Lord Neuberger, said there is only one iron unbending law in this country, and that is the law of unintended consequences. That wry observation applies perhaps with greater force to laws that emanate from Brussels. The whole point of Brussels II Revised (BIIR) was to eliminate the delay that was inherent in the bad old days, the bad old procedures, where courts took an age to determine what was the appropriate forum in which disputes about parental responsibility would be resolved. In its place, there was wheeled out a brave new world of automatic jurisdiction, which was founded on the principles within the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters which was adopted by the then members of the European Union in 1968.

[2] So it was in considering the BIIR Regulation on 23 September 2010 that I pointed out that, I having made an order in relation to parental responsibility in respect of children over whom I had jurisdiction and where I was, to use the language of the regulation, the court first seised, I expected my judgment to be recognised and implemented in Austria, if not in days, then certainly in weeks. That was 14 months ago, but we are no nearer to a welfare adjudication of the future of the small children with whom I am concerned in either jurisdiction.

[3] The state of affairs with which this court is presented and which I will develop when I recite more of the facts are truly entitled to the description of scandalous. In my judgment of 23 September 2010, I explained that the matter concerned two children, C, who was then 5, but who is now 6, and A, who was then 1 and who is now 2. I do not propose to recite the history up to the date of that judgment. Anybody considering this judgment should, at this point, read my judgment of 23 September 2010.

[4] When I gave my judgment on 23 September 2010, the children had been in the care of the mother in Austria since May. That was for 5 months. The father had initiated proceedings under the Hague Convention there, which I explained, I believe with some clarity and at some length, was a completely misconceived avenue for him to have travelled down. Rather, as I pointed out (again, with clarity), the steps that he should have taken were to register for enforcement under Art 28 my earlier order, and indeed the order that I was going to make on that day.

[5] The non-recognition of that judgment could only be refused on the extremely limited grounds set out in Art 23, which are far narrower than the defences available under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). Moreover, as I have explained, issues as to whether the children were, in fact, habitually resident in England at the time of my judgment would not trouble the Austrian court, because that would be a decision that would have been made by me, and me alone, under the terms of the regulation.

[6] So I had expected that the father would move with alacrity and speed to take the steps that I considered were appropriate; namely the registration and enforcement of my judgment. That was the first central basis or track of my judgment. But there were other important aspects, which are extracted

from the undertakings given by the father, and which are set out in my order of 23 September 2010. They were as follows:

> 'Upon the father undertaking, provided that the mother returns the children to this jurisdiction by no later than 14 October 2010, and that she affords the father reasonable contact with the children, as follows:
>
> (a) Not to initiate or support any criminal or civil proceedings in this jurisdiction concerning the mother's removal of the children to Austria;
> (b) To allow the mother to occupy the family home with the children;
> (c) To allow the mother to have care and control of the children until the first *inter partes* hearing of any application by either party in relation to the welfare of the children and;
> (d) To provide reasonable maintenance to support the mother and the children to live in England.'

[7] So it can be seen that it was a central part of my decision that the mother should continue to be the primary caregiver of these children and that they should be together.

[8] Following that judgment, the father did not take any of the steps that I suggested, but instead, he reinstituted the Hague Convention proceedings which, in my judgment, I had described as totally misconceived. Those, I think, began again in February 2011, and were adjourned to 16 June 2011, and then adjourned again to 16 August 2011, by which time an event had occurred which I will describe a little later, and was finally determined by Judge Ertl on 5 September 2011, who, in line with the previous decisions, declined to make an order for the return of A (C being in England in circumstances which I will describe), concluding in the application of Austrian domestic law that neither of the children were habitually resident here at the time they were removed from this jurisdiction by the mother. She stated:

> 'The necessary length of time to transform a simple stay into an ordinary one depends on the circumstances of each case and, in particular, the age of the person concerned. While the social relations of an infant or baby essentially on the legs [sic] of the caregiver person in the family limit quickly, and accordingly from the assumed habitually residence, with kindergarten children, a far greater timeframe is needed to settle in a new place of residence. The court takes as a benchmark for minors a period of approximately six months'.

[9] So, not particularly surprisingly, given the facts of this case, habitual residence for the purposes of the Hague Convention applying Austrian domestic law was not found. So, yet again, the Hague Convention application made by the father was refused. His appeal in this instance failed, but I am told that today he has lodged a further appeal to yet a higher court. I cannot forbear from expressing my amazement that this course is being adopted,

given the terms of my judgment given 14 months ago. The father still now has not made the application that he obviously should have made.

[10] Indeed, I made an order on 9 September 2011 in these terms:

> 'The plaintiff father do by 4 p.m. on Friday, 7 October 2011 file with the court and serve on the defendant mother an affidavit or witness statement explaining the steps that he has taken to have recognised and enforced in Austria the order made on 23 September 2010 by Mostyn J requiring the return to England & Wales of the children, [A] and [C], and the reasons for any delay in that regard and if he has not taken any such steps explaining why not.'

[11] Although the father has produced witness statements from himself and from his solicitor explaining the administrative chaos that caused the failure to produce to me the Annex II Certificate referred to in my judgment, I have not been given any explanation as to why, at least in the summer of this year, no steps had been taken to register and enforce my order in Austria.

[12] Mr Setright QC tells me, in opening his submissions, that, although the father instructed lawyers in August to enforce that order, he did not have the funds to pursue it; that he now has the funds by means of borrowing to take those steps, which will happen today/tomorrow.

[13] The Austrian court permitted the father to have contact with C, and the mother consented to that. That contact took place last summer, on 12 August 2011. But the father did not return C to the mother after that contact. Instead he said he made the decision on the spur of the moment to leave, and he travelled across continental Europe overland, I think as far as Paris, where, by virtue of an order made by Coleridge J, a travel document was issued to C to enable him to be brought to this country. So the father has, by self-help, effected an implementation of my orders made in May and September of last year.

[14] Mr Turner's wrath as to the steps taken by the father has almost known no bounds. But the decision I am going to make today is certainly not based in any way as some kind of public condemnation of what the father did. The only consideration that motivates me today is the best interests of these children, looked at together.

[15] The situation since 12 August 2011 could not really be more unsatisfactory. These two siblings, who should be living together and enjoying each other's society, have been apart and have not had contact with each other. I have made two orders providing for Skype contact; one on 9 September 2011 and one on 27 October 2011, the latter being highly prescriptive providing various times and periods at which Skype contact should take place. Mr Turner tells me (and this was not disputed until a moment ago) that that has not taken place, although Mr Setright says there has been some Skype contact. If it has taken place, which I rather doubt, it seems to have been extremely limited and unsatisfactory.

[16] So these little boys have now, since August, been separated. Moreover, they have not been looked after by their mother. The whole basis of my order, as Mr Turner rightly points out, is that she is the primary caregiver.

[17] I have expressed my extreme disquiet that no steps have been taken now for 18 months to arrange a welfare inquiry either in this court or in

Austria. The time has now come for this court to take decisive action to ensure that an appropriate forum determines the welfare issues in relation to these children. This delay and legal manoeuvring simply cannot go on for a minute longer.

[18] In circumstances where the father has taken no steps to do what I suggested he should do and what the regulation contemplates, and in circumstances where there is no prospect of the Austrian authorities, as I see it, returning the mother and A to this jurisdiction any time soon, I have decided that the only step that I can take is to make an order in the best interests of C for the summary return of him to Austria, and to discharge all existing English orders on the basis that Austria is the better place within the terms of Art 15 to determine the welfare interests of these children.

[19] However, I am not going to discharge my orders and make an order for actual transfer until I am satisfied that the father will not be imperilled at all, whether by criminal or civil proceedings in Austria, arising from his removal of C to this country on 12 August 2011. I will need the clearest possible evidence that the father will face no such perils, and that he will be able to participate in an Austrian welfare inquiry.

[20] By the same token, the slate must be clean on both sides. It is, I suppose, arguable that the mother could face a criminal complaint for her removal of the children in May 2010, or contempt proceedings for failure to comply with my order. So I am expecting the parties, in the light of this judgment, to negotiate a wiping of the slate clean.

[21] The order that I make is in conformity with the decision of the House of Lords in *Re J (Child Returned Abroad: Convention Rights)* [2005] UKHL 40, [2006] 1 AC 80, [2005] 3 WLR 14, [2005] 2 FLR 802, and it is an order that I judge to be in the best interests of C. It is in his interests that he is reunited with his mother and his brother, and that, as soon as possible, a court applying familiar best interest principles decides what arrangements should be made in relation to their residence and contact.

Later

[22] So far as I am aware, there has not before been a reported case where this court has relinquished its superior jurisdiction in favour of another EU State and made a welfare-based decision for transfer of the children to another EU court in circumstances where the machinery in BIIR has been ineffective, either because of a failure of the judicial administration in the second State, or because of a failure of one or other party to engage that machinery.

[23] Although I do not agree at all with the way that Mr Setright has framed his proposed grounds of appeal, and I do agree with Mr Turner that an appeal in this case should specify specific areas of principle in the way in which I have dealt with the case, as opposed to merit-based criticisms or criticisms that are rooted in an alleged failure by me to consider this or that aspect of evidence, I do consider that the propriety of what must be regarded as, if not an unprecedented course taken by me, then certainly an unusual course taken by me, warrants a review by the Court of Appeal. For, after all, I have, to all intents and purposes, thrown in the towel and accepted a state of affairs which is contrary to that which I originally ordained in my judgment of September 2010; namely that both children should be brought here at the soonest opportunity for there to be a welfare inquiry.

[24] In those circumstances, I am going to grant liberty to appeal on terms that a notice of appeal is lodged with the Court of Appeal within 14 days. I am not going to seek to confine the grounds. It is a general grant that I have made. So Mr Setright will be able to formulate his grounds with due consideration within the period that I have mentioned.

Order accordingly.

Solicitors: *Crosse & Crosse* for the applicant
Dawson Cornwell for the respondent

SAMANTHA BANGHAM
Law Reporter