Neutral Citation Number: [2020] EWCA Civ 1030

Case No: B4/2020/0354

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)
Ms Justice Russell
CCR2018/23, HS18P00283, FD18P00572

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 August 2020

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE PHILLIPS

- -

E (BIIa: Recognition and Enforcement)

- -

Jacqueline Renton and Charlotte Baker (instructed by **Freemans Solicitors**) for the **Appellant Father**
The Respondent Mother was unrepresented and did not attend
Mark Jarman and Lucy Logan Green (instructed by **Cafcass Legal**) for the **Respondent Children by their Children's Guardian**

Hearing date: 25 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Tuesday, 4 August 2020.

Lord Justice Peter Jackson:

Overview

1. This appeal concerns the extent of the obligation upon the court in England and Wales to enforce a foreign order in relation to children. It directly concerns one provision of the Brussels II revised Regulation (Council Regulation (EC) No. 2201/2003) ('BIIa') but the underlying principles are of broad application in cases where the court is faced with an enforcement application alongside a welfare application.

2. At the global level, the 1996 Hague Child Protection Convention, ratified by the United Kingdom in 2012, provides rules for jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children as between participating states. At the European level, BIIa performs a similar function, building on the Convention of 2001 ('Brussels II'), which focused on jurisdiction and recognition of judgements in matrimonial matters and matters of parental responsibility in respect of the children of spouses in matrimonial proceedings, and the much earlier civil and commercial regime in the 1968 Brussels Convention ('Brussels I'). These instruments have the common purpose of promoting international co-operation for the benefit of children and avoiding conflicts of jurisdiction. Treating the best interests of children as a primary consideration, they provide a mechanism for the mutual recognition of judicial decisions, so that a judgment in one participating state is to be recognised and enforced in another participating state in effect as if it was a domestic judgment given in that state.

3. These objectives are pursued in a number of ways: general jurisdiction is given to the state in which the child is habitually resident at the time the court is seised and continues exclusively for so long as it remains seised; in the interests of the child, the case may be transferred to the court of another state that is better placed to hear it; urgent provisional measures can be taken on the basis of the child's presence; the hearing of the child is a matter of importance; recognition and enforcement should be based on mutual trust and specified exceptions should be kept to a minimum; in particular, the substance of a judgement given in the first state may not be reviewed in the second state; finally, the process of recognition and enforcement is to be carried out without delay.

4. The present appeal relates to two children, now teenagers, who have lived in England and Wales for most of their lives and have been habitually resident here for at least six years. They have been the subject of long-running, overlapping proceedings in Spain (2013-2018) and England and Wales (2016-date). The judgment now under appeal concerned:

   (1) Applications by the children's father to enforce orders of the Spanish Court, made in 2016 and upheld on appeal in 2018 at a time when it had general jurisdiction, granting custody to him.

   (2) An application by the children's mother, made later in 2018 at a time when the English court had general jurisdiction, for an order that the children live with her.

5. In these circumstances, the potential for conflicting decisions is evident. That possibility was foreseen by BIIa which, by Article 23, provides a number of circumstances in which a judgment cannot be recognised. Of specific relevance to this case, Article 23(e) provides that a judgment relating to parental responsibility shall not be recognised in another Member State if it is irreconcilable with a later judgment given in that Member State.

6. In this case, the English court refused recognition of the Spanish orders on the basis that they were irreconcilable with an order that it made on the same occasion, which provided for the children to live with their mother. The father now appeals with permission of Moylan LJ on two grounds: firstly, that as a matter of law the judge was not entitled to rely on Article 23(e) and, secondly, that the hearing was procedurally unfair because the judge made a final welfare order without hearing full evidence.

The family and procedural history

7. The two children are A, a girl now aged 16, and J, a boy aged 13. Their parents, who are both medical professionals, are Spanish. In 2002 they married in Spain, in 2003 A was born, and in 2004 the family moved to Pamplona, where the father's family is based. In 2006 the parents and A moved to England, and J was born in that year. In July 2011 the family returned briefly to Pamplona before moving to the Canary Islands, where the children attended a British school. In July 2012, the father returned to Pamplona, where he remains, and in 2013 the parents' marriage broke down.

8. Legal proceedings began when the mother filed for divorce in Spain in September 2013. She was granted interim custody of the children and in December 2013, with the permission of the Spanish court, the three of them returned to England, where they have lived ever since. Contact in Spain took place in accordance with the Spanish order, and included the children spending a month with their father in the summer and a week at Christmas.

9. However, the children's situation has never been tranquil. From the outset the father has sought their return to Spain, with or without the mother, and several interviews were conducted with the children in Spain by a court-appointed psychologist. In a report in February 2016, she recorded that both parents were significant figures for A, who was enduring a conflict of loyalties without taking sides. Although A considered her home to be in England with her mother and friends, she also had a feeling of belonging in Pamplona. J wanted his parents to solve their problems and live together again. He was reported to have secure bonds and a positive relationship with both parents. The psychologist identified pathological inter-parental conflict, with the mother exercising power and authority and the father being resistant and passive.

10. On 27 June 2016, the Court of First Instance No. 3 in Pamplona, finalised the parents' divorce and made a custody order in the father's favour. The children were then aged 12 and 9 respectively. The decision was appealed by the mother on 1 September 2016. However, on 20 September 2016 the Spanish court ordered the mother to hand the children over to the father's care and imposed a fine of €100 for each day that passed without her doing so.

11. In October 2016, the father began enforcement proceedings in England. These were stayed in November 2016 in the light of the mother's Spanish appeal, as permitted by

Article 27 BIIa, and Ms Roddy was appointed as Children's Guardian to uphold the interests of the children in the litigation. In January 2017 she reported that A, now 13, loved her father but was clear that she viewed the UK as her home and did not want to start in Spanish schooling. J, aged 10, was very negative about his father and about a proposed move to Pamplona.

12. Matters were further exacerbated by an incident that occurred in April 2017, when the children went to spend a fortnight at Easter with their father in Spain. He instead took them on to the Far East. The children were located by the mother in Indonesia and with the assistance of the Spanish consul they were reunited with her and returned to England 10 days after the end of their intended holiday. This incident was described by the Guardian as a frightening experience for them. In May 2017, she recorded A as saying that she wanted to live with her mother in England and to spend time with her father in England, and also in Spain if she could be assured she would be returned to England. J said he wanted to live with his mother and enjoyed his time with his father. He wanted to return to spend the holidays in Spain as long as there was an assurance that he could come back to England.

13. Since that time contact has not been taking place reliably and the parents have continued to be in conflict about where the children should live. In July 2017, the Spanish appeal court, the Third Section of the Provincial High Court of Navarra, resolved to obtain a new expert psychological report and to carry out further interviews of the children. In August 2017, the father filed a criminal complaint in Spain seeking the arrest of the mother for failing to place children in his care. The mother did not comply with orders requiring her to bring the children to Spain for interview in September 2017.

14. In September 2017, a hearing took place in England before Baker J. He noted that the case was unusual in that the Spanish court, which was first seised as a result of the divorce proceedings, had continued to make welfare decisions long after the children had become habitually resident in England and Wales. He made a request to the Spanish court under Article 15 for the transfer of the proceedings to this jurisdiction and recommended judicial liaison to resolve what he described as an unhappy dispute that had blighted the lives of the children for too long.

15. In October 2017, in a reasoned decision, the Spanish court declined to transfer jurisdiction. In January 2018, the children spent Christmas and New Year with their father in Spain, where they were seen by the psychologist and the appeal judge. A said that she wanted to be with her friends and go to school in England and also wanted to see her father and family. She was tired of the tension between her parents. J had a positive view of his mother, but opted to live with his father, although he was worried about changing schools.

16. In July 2018, the Spanish appeal court dismissed the mother's appeal from the 2016 custody decision. It noted that the children had expressed different views in the Spanish and English proceedings. It considered that the life and development of the children was not being conducted in an appropriate family environment and that the children did not have the necessary emotional stability. Despite the adaptation required, particularly by A (by now 14) in the light of her views, the change would not be insurmountable.

17. The dismissal of the mother's appeal formally concluded the Spanish proceedings. However, the Spanish court of first instance went on to make an order in August 2018

prohibiting the mother from removing the children from England until they were placed with the father, and prohibiting the issuing to the mother of Spanish passports for the children. In December 2018, it made a further order that the children live with their father. These orders were registered for enforcement by the District Judge and the mother appealed to the High Court.

18. Meanwhile, in October 2018, the mother had issued proceedings under the Children Act 1989 in her local Family Court, seeking a child arrangements order for the children to live with her and a prohibited steps order to prevent the father from removing them from England and Wales. In November 2018, Gwynneth Knowles J appointed Ms Roddy as the Children's Guardian in those proceedings and listed the matter for further hearings in January and February 2019 for determination of the question of jurisdiction. At the hearing in January 2019, Williams J gave directions both in relation to the mother's Children Act application and her appeals against the registration orders, directing that they be listed for final hearing on 25 and 26 February 2019.

19. That hearing was listed before Russell J, who thereafter had conduct of the proceedings, but it was postponed from February to April (when the stay on the father's original enforcement application was lifted), and then to September 2019. In the meantime, the father had limited contact in England: a meeting in the presence of the Guardian in April and a summer holiday in August.

20. The eventual final hearing took place on 4-5 September and 4 October 2019, with the mother, who has been unrepresented throughout, attending on the last day only. The father and the Guardian were represented. Evidence was given by both parents and by the Guardian. Written submissions were lodged on 7 October, but judgment was not given until 3 February 2020.

General jurisdiction in matters of parental responsibility

21. The lynchpin of BIIa in relation to parental responsibility is found in Article 8, entitled 'General Jurisdiction' which provides that:

> "1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that member state at the time the court is seised. …"

This jurisdictional rule is explained in Preamble 12 as being shaped in the light of the best interests of the child, in particular on the criterion of 'proximity'.

22. Article 16 defines the circumstances in which a court is deemed to be seised, and Article 19.3 requires a court that is seised second to decline jurisdiction in favour of a court that is seised first. Article 17 requires that in a case where the court in one Member State has jurisdiction and the court in another Member State does not, the latter shall declare of its own motion that it has no jurisdiction. Accordingly, general jurisdiction in matters of parental responsibility will rest with the court of the Member State of habitual residence from the commencement of its proceedings until their conclusion. The corollary is that general jurisdiction thereafter lies with the court of any Member State in which the children are habitually resident.

Recognition and enforcement

23. The core principle of mutual recognition is set out in Article 21:

> "1. A judgment given in a Member State shall be recognised in the other Member State without any special procedure being required.
>
> …
>
> 3. Without prejudice to section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised."

24. The spirit in which recognition and enforcement should be approached appears from Preamble 21, which states:

> "The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required."

This is bolstered this by Article 26:

> "Under no circumstances may a judgment be reviewed as to its substance."

25. However, Article 23 sets out seven cases in which judgments relating to parental responsibility shall not be recognised:

> "A judgment relating to parental responsibility shall not be recognised:
>
> (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;
>
> (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;
>
> (c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;
>
> (d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

> (e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;
>
> (f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.
>
> or
>
> (g) if the procedure laid down in Article 56 has not been complied with."

26. Further, as mentioned above, Article 27 allows for recognition proceedings to be stayed if an appeal against the judgment has been lodged in the state in which the judgment was given.

27. Turning to enforcement, Article 28 provides for a declaration of enforceability, with specific provision for the system of registration that exists in the United Kingdom:

> "1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.
>
> 2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom."

28. Article 30 provides that the procedure for making the application shall be governed by the law of the Member State of enforcement.

29. Article 31 provides for a decision to be taken without delay and for the process to be one-sided in the first instance:

> "1. The court applied to shall give its decision without delay. Neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application.
>
> 2. The application may be refused only for one of the reasons specified in Articles 22, 23 and 24.
>
> 3. Under no circumstances may a judgment be reviewed as to its substance."

30. Article 32 provides for notification of the decision to be given to the applicant:

> "The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure lain down by the law of the Member State of enforcement."

31. Article 33 provides an appeal mechanism for the respondent:

> 1. The decision on the application for a declaration of enforceability may be appealed against by either party.
>
> …
>
> 5. An appeal against a declaration of enforceability must be lodged within one month of service thereof. …"

32. Article 47 provides for enforcement as if the order had been made domestically, excepting subsequent irreconcilable judgments:

> "1. The enforcement procedure is governed by the law of the Member State of enforcement.
>
> 2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.
>
> In particular, a judgment which has been certified according to Article 41(1) or Article 41(2) cannot be enforced if it is irreconcilable with a subsequent enforceable judgement."

33. The procedural code for the registration of orders under BIIa and the 1996 Hague Convention and certain other Regulations is contained in Part 31 of the Family Procedure Rules 2010. Its detailed provisions are designed to ensure that incoming requests are efficiently processed. As noted above, in the United Kingdom enforcement is achieved by the process of registration. Registration is in the first instance an essentially administrative process, although a judicial act is required. Any substantive dispute takes the form of an appeal to the High Court, issued within a month of the date of service of the notice of registration. In the absence of a successful appeal, the order will continue to be recognised and it will be enforceable as if it was a domestic order. The effect of a successful appeal is that the order cannot be recognised, and therefore cannot be enforced.

34. Rule 31.4 concerns the application for registration:

> "(1) Any interested person may apply to the court for an order that the judgment be registered, recognised or not recognised.
>
> (2) Except for an application under rule 31.7, an application for registration, recognition or non-recognition must be –
>
> (a) made to a district judge of the principal registry; and

> (b) in the form, and supported by the documents and the information required by a practice direction."

35. Rule 31.11 provides for the determination of the application for registration. The register of judgments is a central index kept at the Royal Courts of Justice (as the Principal Registry). Entry of the order in the register is the final stage of the application.

36. Rule 31.12 concerns the effect of registration, namely recognition:

> "Registration of a judgment under rule 31.11 will serve for the purpose of Article 21(3) of the Council Regulation, Article 24 of the 1996 Hague Convention, regulation 7 of the Jurisdiction and Recognition of Judgments Regulations or regulation 5 of the 2014 Regulations (as the case may be) as a decision that the judgment is recognised."

37. Rule 31.15 provides for appeals:

> "(1) An appeal against the court's decision under rules 31.10, 31.11 or 31.14 must be made to a judge of the High Court –
>
> (a) within one month of the date of the service of the notice of registration; …"

38. Rule 31.16 provides for a stay of enforcement where an appeal is pending in the state of origin, as occurred in this case.

39. Rule 31.17 provides that enforcement must await the expiration of the applicable appeal period:

> "(1) Subject to paragraph (1A), the court will not enforce a judgment registered under rule 31.11 until after –
>
> (a) the expiration of any applicable period under rules 31.15 or 31.16; or
>
> (b) if that period has been extended by the court, the expiration of the period so extended.
>
> (1A) The court may enforce a judgment registered under rule 31.11 before the expiration of a period referred to in paragraph (1) where urgent enforcement of the judgment is necessary to secure the welfare of the child to whom the judgment relates."

The judge's decision

40. The judgment of Ms Justice Russell can be found at [2020] EWHC 162 (Fam). It is unnecessary to repeat the tangled procedural history during 2019 which led to the loss of final hearing dates in February and in April: it is set out by the judge at paragraphs 22 to 25.

41. Before coming to the judgment itself, these matters deserve comment:

(1) At one point, Ms Jacqueline Renton, who appeared for the father below and, together with Ms Charlotte Baker, on this appeal, sought to suggest to us that the father's enforcement application was the only application before the judge. That is not so. It is clear from the five case management orders that preceded the hearing that the mother's application for domestic welfare orders was before the court as well as her appeals from the registration of the Spanish orders.

(2) Before the judge, the mother asserted that recognition should be refused under both limbs (a) and (e) of Article 23; indeed, she placed greater emphasis on the former ('recognition manifestly contrary to public policy'). On behalf of the Guardian, Mr Mark Jarman, who also appeared on this appeal, argued that both limbs were available to the court, but he placed greater emphasis on the latter. The father's case was heavily weighted towards refuting the Article 23(a) claim. Nonetheless, he did engage with Article 23(e) in his statement of 4 June 2019, in which he stated (correctly at the time) that there was no later judgment in England, before going on to assert that there could be no later judgment because "jurisdiction in respect of welfare matters rests solely in Spain". In her written opening submissions to the judge, Ms Renton put it that Article 23(e) could not apply because "enforcement applications take priority". In her written closing submissions no further reference was made to the provision, but its applicability was maintained by both the mother and the Guardian.

(3) By process of case management the disputed issues were crystallised in this way: (1) why the children had had such limited contact with their father since 2016; (2) why they had expressed different views at different stages of the proceedings; (3) whether or not the Spanish custody order should be enforced, and if so how and when; (4) the issue of children's Spanish passports and ID cards, which had been embargoed by order of the Spanish court. Reflecting this list of issues, the oral evidence was to be limited to these questions: how enforcement might take place, the mother's attitude and actions and the reasons for the difficulties with contact, the children's wishes, and whether the mother would move to Spain if the order was enforced. The confinement of the issues and the oral evidence was doubtless the result of the father's argument that his enforcement application took precedence and his having objected to the court hearing any oral evidence at all. Ms Renton's skeleton argument at the outset of the hearing put it this way:

> "If the court is going to hear oral evidence, then that evidence should be carefully confined, bearing in mind the strict parameters of BIIR enforcement."

(4) Although the father formally pursued his application for the immediate transfer of both children to Spain, he acknowledged that, as A was then in the middle of her GCSE course, it might be better to leave things until after she had taken her exams in the summer of 2020 and then, as he put it, "see what she says". In the meantime, he pursued the immediate transfer of J alone, either immediately or at the end of A's exams.

(5) Before the judge, it was common ground that the dismissal of the mother's appeal in August 2018 brought the Spanish proceedings to an end. That consensus was recorded in the order of 9 April 2019. However, on this appeal

Ms Renton suggested to us that the Spanish court remained seised until the last order was made by the first instance court in December 2018. I consider that the position taken by the parties and adopted by the judge was correct, but in the end it makes no difference as the English court was plainly seised throughout 2019 and since.

(6) Lastly, by the time of the judgment and order, A had turned 16. Section 9(7) of the Children Act 1989 provides that a welfare order of the kind made by the judge shall not be made in respect of a child who has reached that age unless the court is satisfied that the circumstances of the case are exceptional. The parties asked for any order to be made in relation to both children and the judge stated that she was so satisfied.

42. In her judgment, after setting out the history, the judge began by finding that the principal features of the case are that the children were habitually resident in England and that they want to remain here. She put it this way:

> "31. The relevant law governing this case is contained in the Regulation BIIa, the Senior Courts Act 1981 and Children Act 1989 of which more below. In this judgment I shall make no attempt at a lengthy exposition nor comprehensive analysis of the law, nor is my judgment intended, in any sense, to stand counter to the previous judgments of the Court referred to above. This judgement is made on the facts before it in respect of these particular young people. The principal fact is this; on any objective and neutral analysis both children are habitually resident in England. They have lived here since 2013, are settled here and fully integrated into their school and education as well as in their peer group and social environment; there is no evidence before this Court which could be said to amount to anything of substance contrary to such a finding. Wherever the proceedings concerning them both commenced or was initiated they have been living with their mother in England for an uninterrupted period exceeding six years. They have never been in their father's sole care nor has he ever cared for them alone for any substantial period of time.
>
> 32. Secondly, as far as the evidence before this Court is concerned, both A and J want to remain living in the England and both have been equally consistent in expressing this to be their wish, to this Court, over a period of years. I make no attempt to analyse what occurred during the proceedings in Spain nor to go behind it, but I am bound to reach any decision I make on the evidence before this Court which, in turn, is based on the independent analysis of their guardian Ms Roddy from whom I heard oral evidence; evidence which, under cross-examination, remained as she had set out in her written analysis."

43. The judge then set out Ms Roddy's evidence in detail. It supported the children remaining with their mother and having regular contact with their father. The judge laid emphasis on A's age and the cogency of her reasons for not wanting to be sent to

live in Spain. She agreed that the children have a right and a need to know and spend time with her father but she noted that, while the mother may have failed to promote children's relationship with him, her actions had not taken place in isolation and that the failure of the parties to work together was reflected by the conflict between the two jurisdictions. She accepted the Guardian's evidence that the mother represents the children's key attachment figure and role model and she noted her strong professional opposition to the children being separated, a prospect described by A as *"horrible"*; J would, in Ms Roddy's view, struggle to live in Spain without A. Ms Roddy was also concerned about the obstacles to the children travelling safely to Spain and returning. The children were in her opinion *"frankly, fed up with the proceedings and irritated at saying the same thing over and over…"* The father's pursuit of the move to Spain and away from everything familiar to them was in the Guardian's view interfering with their ability to have the relationship they should have with him.

44. The judge briefly referred to the parents' evidence, saying that the father showed only limited empathy with the children's situation while the mother was more realistic about the effects on the children of the parental conflict.

45. In directing herself on the law, the judge turned first to Article 23(a). She considered it arguably contrary to public policy to recognise and enforce an order against the clear wishes of a young person aged 16, but found that the same could not in her view be said for someone aged 13. She next referred to the question of whether the length of time the children had been in England might engage Article 23(a), but did not appear to reach any decided view about that. In the end, the judge did not rely Article 23(a) and that aspect of her analysis forms no part of this appeal. Instead, after a further rehearsal of the history, she framed her conclusions with reference to Article 23(e):

> "59. As the Spanish court has made final orders it must follow that jurisdiction falls to be considered pursuant to Art 8 BIIa; on the basis of the children's habitual residence, which is England, as a consequence of which this court has jurisdiction, pursuant to Art 17 [*sc.* 16] BIIA. This is by virtue of the fact that M's application for child arrangements orders and Prohibited Steps Orders were issued for the first in time in October 2018, subsequent to the conclusion of the Spanish proceedings. F himself reapplied for orders in March 2019; although his original application was made in October 2016 it was stayed by order of Mr Justice Holman on 28 November 2018.
>
> 60. In July 2018, when the Spanish appellate process ended, the Spanish proceedings had concluded as accepted by F. It was submitted on behalf of A and J that as a matter of fact there are no "concurrent" proceedings and therefore it must also follow that there can be no argument as to which court is currently seized; it is this court. There are no proceedings currently in Spain, nor have there been since July 2018 well over a year ago at the time of trial. There are extant Children Act 1989 proceedings before this court. In addition based on Recital 12 of the 2003 Regulation which provides "*The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the*

> *child, [my emphasis] in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility"*
>
> 61. It is hard to see any other logical conclusion based on their habitual residence and proximity other than that this court has jurisdiction and that the best interests of A and J are best served, as recommended by their guardian, by remaining living with their mother in England. Any order made in an English and/or Welsh court now would be an "*a later judgment*" for the purposes of Art 23 (e) and any order based on the best interests of A and J as set out above in the evidence of their guardian "*irreconcilable*" with the Spanish order. The evidence of this experienced guardian is accepted by this court as self-evidently congruent with the views of A and J and their welfare. Art 23(e) reads "*e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought."* Jurisdiction is with and in this court as a result of the conclusion of the proceedings in Spain, the subsequent commencement of Children Act 1989 proceedings in this jurisdiction and the children's habitual residence in England.
>
> 62. M's appeal against enforcement is allowed pursuant to Art 23 (e).
>
> 63. Exceptionally, given AB's age there will be s8 CA 1989 child arrangement orders in line with the guardian's recommendations; that A and J live with their mother, M; A and J are to have contact, or spend time, with their father, F in England and Spain, at dates and times to be agreed, no less than 3 months in advance (and in default the first half of all school holidays is to be spent with F) during the children's school holidays, subject to F providing written permission to renew the children's passports immediately and providing satisfactory documentary evidence that all criminal complaints against the M in Spain has been withdrawn and the order dated 14th December 2018 has been discharged. Following any contact or time spent with their paternal family in Spain, F must ensure that A and J are returned to the jurisdiction of England and Wales."

The appeal

46. The father's appeal relates only to J. Ms Renton's skeleton argument suggested that the appeal could not apply to A as BIIa does not apply to children over 16. In fact, there is no specific age limit within BIIa (though the age of 18 will appear in the BIIa Recast Regulation), and the age limit for enforcement will depend upon the national law of the court of enforcement: see the *Practice Guide* to BIIa at 3.1.1.1. In this case, although English law allows for orders to be made in respect of children over 16 in

exceptional circumstances, Ms Renton reaffirmed to us after further consideration that the father pursues this appeal in relation to J only.

47. The first ground of appeal is that the judge was wrong as a matter of law to find that Article 23(e) applies in the circumstances of this case. In summary, Ms Renton submits that the provision can only apply if the later irreconcilable judgement exists *before* the application is made for recognition and enforcement. She argues that this restrictive interpretation appropriately reflects the ethos of mutual trust between States, the principle that grounds for non-recognition should be kept to a minimum, and the prohibition on a judgment being reviewed as to its substance. Any other reading would, she says, make unacceptable inroads into the enforcement scheme of BIIa. An enforcement application could always be defeated by an order made by a court in the requested State, assuming that it had acquired general jurisdiction in the meantime. In this regard she points to observations made by Macur J in *Re LSdC,* cited below. She also notes the emphasis in the Regulation and in domestic and international case law upon enforcement applications being processed without delay, and argues that this would be prevented if an enforcement application could be met by a potentially protracted welfare enquiry. In this case, she asserts, the father's enforcement application should have taken priority, and the mother's domestic welfare application should have been stayed and should only have been considered at a later stage if recognition of the Spanish order was for some reason refused.

48. In support of her suggested interpretation, Ms Renton notes that there is no reported case in England and Wales or in any other Member State where the outcome has depended upon Article 23(e), still less any case in which enforcement has been refused on that ground. She points in particular to *Re D (A Child) (International Recognition)* [2016] EWCA Civ 12 as providing at least one instance of a heavily-fought case in this jurisdiction in which similar issues arose without any suggestion being made that Article 23(e) might apply.

49. Ms Renton asserts that these arguments were made to the judge, but that, despite it being a novel point of law of wider importance, the judgment contains no legal analysis in support of the judge's decision on this issue. Moreover, while stating that she could not go behind the Spanish orders, the judge in fact ignored them.

50. Finally on this ground, Ms Renton raises for our consideration whether this court, which is the final appeal court for appeals in recognition and enforcement applications under Articles 21-39 of BIIa, should refer the question of interpretation of Article 23(e) to the Court of Justice of the European Union in accordance with Article 267 of the Treaty on the Functioning of the European Union. Unless we consider the matter to be *acte clair* – so obvious as to leave no scope for any reasonable doubt – we must do so: *CILFIT* (Case 283/81) [1982]. Ms Renton points out that there is no reported CJEU decision on the subject, nor does the *Practice Guide* to BIIR shed any light on the matter.

51. Ms Renton also notes that the relevant provision in the 1996 Hague Convention, Article 23(2)(e), is not directly equivalent and suggests that, as a result, it does not assist with the interpretation of BIIa. Although I agree that it is not necessary for the purposes of this judgment to undertake any detailed analysis of the provision in the 1996 Hague Convention, I would note that incompatibility with a later order ("measure") is a ground on which recognition may be refused. The difference with Article 23(e) of BIIa is that this is only expressly applicable to "a later measure taken in the non-Contracting State

of the habitual residence of the child". The reasons for this formulation were not explored in the present case and I do not, therefore, propose to comment further on that provision.

52. The other ground of appeal concerns the fairness of the process. It is said that, by case-managing the proceedings so as to limit the evidence to how the Spanish order might be enforced and to the issue of the father's contact, the judge did not receive comprehensive evidence about the children's circumstances. There were no proper Children Act statements. Further, Ms Renton draws attention to passages in the evidence where she says that the judge deterred her from pursuing even the limited issues that had been identified. The evolution of the children's views and the part the mother played is not analysed in the judgment. Ms Renton therefore argues that the court should not have gone on to make a comprehensive welfare order and that the process was inherently unfair. If this ground of appeal alone succeeds, she seeks a rehearing of the enforcement application and the mother's welfare application.

Analysis: Article 23(e)

53. It is the clear aim of BIIa to ensure that there is clarity about which court has jurisdiction (i.e. the power) to make welfare orders about children. Except to the limited extent that Article 20 allows for the taking of urgent or provisional measures, there is no room for concurrent jurisdictions. In this case there can be no doubt that the English court had jurisdiction to make welfare orders at the time that it did. The children were habitually resident here and the Spanish court was no longer seised. The questions that then arise are:

    (1) Whether the court, faced with an enforcement application and a welfare application, was obliged to prioritise the former and stay the latter so that the non-recognition provision of Article 23(e) could not be engaged unless and until recognition and enforcement was refused for some other reason; and

    (2) If the court had no obligation to prioritise, how it should have approached the two applications.

54. As to the first question, any obligation to prioritise could only arise from the terms of BIIa itself, and specifically from an interpretation that in effect adds these words to Article 23(e) itself:

> "(e) if it is irreconcilable with a later judgment relating to parental responsibility given *before the application for recognition is made* in the Member State in which recognition is sought;"

55. There are a number of reasons for rejecting this rewriting of the provision.

56. First, it is not what the provision says.

57. Second, the whole tenor of BIIa is to confer equivalence upon orders made in different Member States, not superiority or priority. There is, as Mr Jarman submits, no principle to justify the imposition of an automatic stay on domestic welfare proceedings. This is reflected in the absence of a procedural provision in the Family Procedure Rules similar

to that which requires domestic proceedings to be stayed in the face of an application under the1980 Hague Child Abduction Convention.

58. Third, the applicability of the rewritten provision would in part depend upon the timing of the application for enforcement, which may lead to random outcomes as there is no time limit for when an enforcement application can be issued.

59. Fourth, such guidance as there is points the other way. The Explanatory Report of Dr Allegría Borrás on Article 15(2) of Brussels II (the equivalent provision to Article 23 of BIIa) contains these passages:

> "72. … Finally, points (e) and (f) deal with non-recognition on grounds of irreconcilability with another judgment and lay down different rules, depending on whether the judgment is given in the Member State in which recognition is sought or in another Member State or in the non-Member State of the habitual residence of the child. Solely with regard to parental responsibility, the judgment with which the judgment for which recognition is sought is irreconcilable must have been given later since earlier judgments will have been taken into account in the judgment connected with the divorce. The objective is to prevent the contradiction which could result, for instance, between a judgment given in another Member State regarding divorce and custody and a judgment given in the forum denying paternity. The commentary on Article 3(3) also needs to be taken into account in this connection (end of jurisdiction of the court hearing the matrimonial proceedings in matters of parental responsibility)."

There is no suggestion here that the provision is linked to the filing of the enforcement application. Further, and of direct relevance, when commenting on Article 18 of Brussels II (the equivalent of Article 26 BIIa), Dr Borrás writes (emphasis added):

> "77. This is the classic prohibition on review as to substance at the time of recognition or enforcement. The same provision appears in Article 29 of the 1968 Brussels Convention and in other Conventions on enforcement. It is a necessary rule in Conventions of this kind in order not to subvert the meaning of the exequatur procedure, which does not mean allowing the court in the State in which recognition is sought <u>to rule again on the ruling made by the court in the State of origin</u>.
>
> 78. The inclusion of this rule in this Convention led to some reluctance by certain delegations in so far as it could mean making the measures adopted in connection with parental responsibility immovable. <u>The object of the provision is to prevent the measures from being reviewed in the exequatur procedure, although it may in no case lead to their being set in stone.</u> The basic principle is that the Member State in which recognition is sought may not review the original judgment, which is the logical consequence of a double Convention.

> However, a change in circumstances may lead to a need for revision of the protective measures, as always happens when we are dealing with situations which, despite having a degree of permanence in time, may need modification. In that sense, for instance, Article 27 of the 1996 Hague Convention makes it clear that the prohibition on review as to substance does not prevent such review as is necessary of the protective measures adopted. In this case too, the provision in this Article must be understood as being without prejudice to the adoption by the competent authority of a new ruling on parental responsibility when a change in circumstances occurs at a later stage."

This commentary therefore draws a clear distinction between "ruling again on the ruling made in the State of origin" during the enforcement process, which is prohibited, and "a new ruling on parental responsibility when a change in circumstances occurs at a later stage", which is permitted.

60. Fifth, the suggested interpretation is not supported by the leading work *Rayden & Jackson on Relationship Breakdown, Finances and Children* (2016), which considers this issue at [47.71-72]:

> *The effect of a change of habitual residence*
>
> [47.71]
>
> BIIa, Art 21(1) obliges a Member State to recognise a judgment relating to parental responsibility (even those not involving cross-border issues) given in other Member States. Recognition is automatic by operation of law and the order remains valid notwithstanding a change in the habitual residence of the child. However, when a child's habitual residence changes, jurisdiction will shift to the new state of habitual residence and that court will, if seised of an application concerning the child, have a theoretically unfettered discretion to make orders under domestic law. However the court in such a case is bound to recognise an existing order and, in the same way as it would not disregard an earlier order made by another domestic court, it must recognise an order made by another Member State. However, in appropriate cases it can make an order which makes different provisions to those made by the earlier order although it cannot 'vary' the order itself. It should only do so (as it would in a purely domestic case) where there has been a change in circumstances which warrant making different provision[1]. To do otherwise would permit the English court to act differently in an EU case as compared to a domestic case. If it does make different provision, the earlier order will not be susceptible to registration and enforcement, and there will exist a ground for non-recognition under Art 23(e). As yet there is no reported authority on whether the English court can, whilst considering a registration/enforcement application, exercise its own substantive jurisdiction to make a different and conflicting order.

The decision of the Court of Justice of the European Union in *Re P* [2] which appears to say that a court with jurisdiction can only refuse to recognise the order of another Member State which had jurisdiction on manifest incompatibility grounds needs to be viewed in the context of two competing but concurrent jurisdictions being exercised. The proper application of BIIa should avoid this arising and the Court of Justice of the European Union noted in that case that the correct remedy in the second seised (but probably legitimate) court of jurisdiction was not non-recognition, but the taking of the steps provided by BIIa to ensure the correct court of jurisdiction was identified.

[1] See Borras Report on BII at para 78.

[2] (Case C-455/15 PPU) EU:C:2015:763 [2016] 1 FLR 337.

Non-review of jurisdiction and substance

[47.72]

The courts in which recognition is sought are forbidden under Art 24 to review the jurisdiction of the court of origin[1]. As to the inter-relationship of Art 24 and public policy as a ground of refusal, see Re S (Brussels II: recognition: best interests of child)[2]. Under no circumstances may a judgment be reviewed as to its substance. As to the similar article in Brussels I, see *Interdesco SA v Nullfire*[3]. However, this does not prevent a court with jurisdiction making a new order when a change in circumstances occurs at a later stage.

[1] Purrucker v Vallés Pérez (No 2) Case C-296/10 [2012] 1 FLR 925.

[2] [2003] EWHC 2115 (Fam), [2004] 1 FLR 571.

[3] [1992] 1 Lloyd's Rep 180.

61. Sixth, Recital 33 of BIIa provides that the Regulation seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union, which is in these terms:

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

The importance attached to the views and best interests of children speaks against any interpretation of BIIa that might marginalise these factors.

62. Seventh, there is clear authority at the European level that reinforces the fact that a requested court *which does not itself have general jurisdiction* cannot refuse to enforce an order because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment: *Povse v Alpago* Case C-211/10; [2010] 2 FLR 1343. That authority is consistent with the general scheme of BIIa, and it does not apply to cases where the requested court itself has general jurisdiction.

63. Lastly, for the reasons set out below, I would not accept Ms Renton's submissions that a literal interpretation of Article 23(e) would allow the requested court to "sidestep the enforcement process altogether", still less that it would lead to the enforcement provisions of BIIa becoming "a dead letter". If a principled approach is taken, that will not happen.

64. I would therefore simply hold that "a later judgment" to which Article 23(e) may apply is a judgment of a court with general jurisdiction that is given after the judgment which it is sought to enforce.

65. The second question concerns the proper approach to be taken where an English court is required to deal with concurrent applications for recognition/enforcement and welfare orders. Where this arises, the power to make welfare orders may, as noted by *Rayden*, be theoretically unfettered, but in practice it is subject to important constraints.

66. In the first place, the court is required to comply with the recognition and enforcement provisions of BIIa and must recognise and enforce the order unless a ground for non-recognition is established. In approaching the grounds for non-recognition, the court must always recall the principle of mutual trust, or comity, contained in Recital 21, and remain mindful that the recognition and enforcement process is not a welfare process.

67. Further, the grounds contained in sub-clauses (e) and (f) of Article 23 differ from the other grounds for non-recognition in that they do not merely involve a process of assessment by the court but can in certain cases be engaged as a result of action taken by the court itself. The scheme and spirit of the Regulation requires the court to act with restraint before exercising its powers in a way that sets up a barrier to enforcement. This is a familiar discipline. To take a purely domestic example, a contact order is made in the Family Court after a substantial hearing. Contact does not take place and an enforcement application is made. It is met by an application to vary the order, without there being any real change of circumstances. The court has the power to hear the variation application but is likely to see it for what it is, namely an attempt to frustrate the enforcement of a valid order. It will not allow it to proceed to a full hearing because that would involve the inappropriate re-litigation of issues that have already been decided; put another way, it would be an impermissible review of the substance

of the earlier decision. In contrast, where the variation application is based upon some apparently significant change of circumstances, the court may well decide to entertain it on its merits alongside the enforcement application. At all events, neither application has automatic precedence: it will depend on the circumstances. This is a conventional assessment for specialist family judges.

68. An example of this this type of assessment is found in the first instance decision in *Re LSdC (Brussels II Revised)* [2012] EWHC 983 (Fam); [2013] 1 FLR 796. The parents of a baby reached an unusual arrangement, endorsed by the Portuguese court, for shared care to be divided between them in Portugal and England. The first time the child came to England, the mother began proceedings in an effort to change the arrangements. In a decision that was reversed on appeal for other reasons, Macur J made these *obiter* observations about Article 23(e):

> "[36] There is no question but that a prohibited steps order, residence order or making L a ward of court would make the Portuguese order irreconcilable and, therefore, justify non-recognition (Art 23(e)). This is obviously dependent upon the court having jurisdiction to do so. Assuming for the point of this argument, that I do (and as I indicate below I determine that I do have jurisdiction) my obvious disinclination to this step made clear during the course of argument arises from the proximity in time of the Portuguese order and the inevitable and implicit review of the substance of the judgment to justify the fresh application. I cannot conceive that the aim of BIIR should be able to be thwarted so readily in such circumstances in the absence of other grounds not to recognise and enforce. I accept Mr Armstrong characterisation of such an exercise as having 'logic [which] is demonstrably unreliable'."

This paragraph represents the sum total of existing English case law on Article 23(e). Ms Renton relied upon it to bolster her argument, but in my view it is difficult to gain much from the decision, because the judge instead found that the Portuguese order should not be recognised on the public policy ground and went on to make orders that were in fact irreconcilable. Her conclusions on habitual residence and Article 23(a) were then overturned on appeal: *Re L (Brussels II Revised: Appeal)* [2012] EWCA Civ 1157; [2013] 1 FLR 430. The decision is in my view no more than an instance of the court finding that it had a power but declining to use it for the purpose of setting up a ground for non-recognition.

69. I accept that there are instances in which the issues of recognition and enforcement have arisen in respect of children who had been in this country for years. In some cases (e.g. *LAB v KB (Abduction: Brussels II Revised)* [2009] EWHC 2243 (Fam); [2010] 2 FLR 1664) the outcome has been enforcement; in others (e.g. *Re D (Recognition and Enforcement of Romanian Order* [2014] EWHC 2756 (Fam); [2015] 1 FLR) it has not. But these cases were not argued on the basis of Article 25(e), whether or not they might have been.

70. I would also acknowledge the importance of recognition and enforcement decisions being taken without delay, as mandated by Article 31. That has not happened in this case, in the first place because of the mother's lengthy appeal in Spain and then because

of the unduly protracted process leading to the decision now under appeal. I also recognise that undertaking inappropriate welfare enquiries is likely to build delay into the enforcement process. But that cannot mean that appropriate, tailored, welfare enquiries should not be carried out where there are real issues to be decided.

71. There can undoubtedly, as Ms Renton submits, be a tension between applications for recognition/enforcement and welfare applications. They are applications of a different character that will arise in a wide range of circumstances. BIIa itself does not purport to eliminate that tension, arising from its provisions in relation to Jurisdiction (Chapter 2) and Recognition and Enforcement (Chapter 3). It cannot be denied that in some cases the resolution of proceedings involving both forms of application will present the court with a challenge, both of substance and case management, but in all cases, the court is required to observe the mandatory obligations arising under BIIa unless it finds that one or more of the grounds for non-recognition have been established.

72. This situation may arise in circumstances where, as here, the application for recognition/enforcement comes before the High Court by way of an appeal against registration. It may also arise where the welfare application is before the Family Court at any level and the court becomes aware that there is a relevant foreign order, whether or not that order has already been registered.

73. Drawing these matters together, where a court is faced with an application for a welfare order in a case where there is an earlier order in another Member State (whether or not that order has been registered in this jurisdiction), it should ask itself these questions:

    (1) Does the court have the power to make welfare orders on the basis that (a) the child is habitually resident in England and Wales or general jurisdiction arises on some other basis, and (b) the court of the other Member State is no longer seised?

    (2) If there is a power to make welfare orders, to what extent is it appropriate on the facts of the individual case to embark upon a welfare assessment of matters that were decided by the court of the other Member State, taking an earlier domestic order as an analogy?

    (3) If a welfare assessment is to be carried out, how can it be case managed to ensure that the issues for decision are clearly set out and that the requirement to determine an enforcement application without delay is observed?

    (4) If the welfare assessment suggests that an order might be made that is irreconcilable with a foreign order, would it be right to make such an order, taking a cautious approach and giving full weight to the conclusions and findings of the foreign court and to the principle of mutual trust that informs BIIa?

    I leave aside the possibility, irrelevant to this analysis, of the court exercising its power under Article 20 to take urgent provisional measures.

74. As to the suggestion of a referral to the CJEU, when Ms Renton was asked at the end of her submissions to indicate the questions that might be referred, she suggested this: *"What is the correct interpretation of Article 23(e)? To what extent are conclusions*

reached in State A binding on State B in circumstances where State B has welfare jurisdiction?" As to the first question I entertain no doubt. The second question is one that has not directly arisen in these proceedings because the application made by the father is for the enforcement of the order made by the Spanish court. Of course, that order was based on the Spanish court's conclusions/findings, but the argument before the judge and before us was not based on any specific findings of the Spanish court but rather upon the global effect of its order. That is not to say that the English court will not give proper weight to findings of a foreign court when making a welfare determination, as is made clear at paragraph 73(4) above. Neither question is suitable for a referral.

Determination of the appeal

75. CPR 52.21(3) provides that:

> "(3) The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

76. Approaching the matter in accordance with the questions posed at paragraph 73 above, I reach these conclusions:

(1) It is true that the judge, as she herself said, did not undertake an extensive legal analysis, but that essentially reflected the very brief submissions that were addressed to her on the scope of Article 23(e). For all that, she was in my view right to find that she had the power to make welfare orders on the basis that the children were habitually resident in England and Wales and that the Spanish court was no longer seised. She was also right not to accept the father's argument that the recognition and enforcement proceedings should take priority. These conclusions dispose of the first ground of appeal.

(2) In embarking upon a welfare assessment, the judge did not ask herself whether and to what extent that was appropriate in the light of the extensive Spanish proceedings and the Spanish custody order, which had to be recognised unless the appeal succeeded. I am nevertheless satisfied that on the facts of this case (by which I mean the age and wishes of the children, the length of their habitual residence in this country and the length of time since the most recent Spanish orders) it was open to the court to entertain and investigate the mother's application.

(3) Unfortunately, the way in which the court intended to address the applications before it was not set out with clarity. No doubt due in part to the nature of the father's submissions, the fact that mother was unrepresented, and the lack of any precedent, the hearing was an uneasy compromise between an enforcement process and a welfare assessment. Properly understood, there was nothing to prevent the judge from hearing focused evidence on all relevant aspects of the children's welfare alongside the enforcement application. Further, the length of

the proceedings far exceeded what was appropriate in the circumstances and took insufficient account of the obligation under Article 31 to determine enforcement applications without delay, particularly bearing in mind the length of time that had already passed as a result of the mother's Spanish appeal.

(4) The judge rightly refrained from carrying out a review as to the substance of the Spanish orders. Such a review, as described by Dr Borrás, would mean ruling again on the ruling of the Spanish court. However, once the court had decided to carry out a welfare assessment, it was engaged in a different exercise altogether, and one that involved taking the Spanish judgments into consideration so that the court had the whole picture. The judge's treatment of this issue at paragraph 31 supports the submission that the Spanish judgments were ignored, but it is clear from her extensive reference to them in her account of the background history that she was well aware of their contents. The result is that her analysis lacks an element in which the Spanish judgments are explicitly considered as part of the overall welfare assessment, and in which her decision to depart from them, notwithstanding considerations of comity, is explained.

77. The second ground of appeal, concerning procedural fairness, is a conventional submission and has some force at the procedural level. The lack of clarity about the interrelationship between the applications and the absence of close attention to the substance of the Spanish judgments – features that I have accepted – led to a welfare inquiry that was undoubtedly less than fully satisfactory.

78. However, after due consideration I have come to the view that the father has not made out his case on the second ground either. These are my reasons:

(1) As Mr Jarman submits, the judge was ultimately faced with a stark choice in this procedurally difficult case. Although I have expressed some reservations about her approach to the welfare assessment (see paragraph 76(2)-(4) above), I am not persuaded that her ultimate decision was wrong. It was a defensible welfare analysis and any shortcomings were in my view matters of form and not of substance. It is clear from the judgment as a whole that, had the judge followed the fuller process of reasoning, she would undoubtedly have reached the same conclusion.

(2) The judge identified the principal facts as being the length of time the children had been in England, their ages and their strong wishes to remain living here. On any view, these were factors of magnetic and almost certainly decisive importance that were bound to dominate any welfare assessment, however it was carried out. When the mother and children came back to England in 2013, A was returning to a country where she had already lived for six years; in J's case he has lived here for all but two of his thirteen years. The judge found that the children are settled and fully integrated into their schooling and peer group and social environment. She noted that the children had been telling their Guardian since January 2017 that they emphatically do not want to live in Spain, that they are exasperated that their wishes are not heeded and distressed that it is now being proposed that they should be separated. The range of realistic options for these children, already so narrow, was further sharply reduced by the father's realistic acceptance that compelling A to move to Spain was not in her

interests. The Guardian's advice that separation of the children against their wishes could not be contemplated was evidence that the judge was entitled to find compelling. Against this background, nothing has been said on this appeal to plausibly suggest that a wider welfare survey could have led to any different outcome. Any procedural irregularity, whether or not it is described as serious, has not led to injustice.

(3) In any case, the Spanish court had not at any stage contemplated separation of the children and the father was therefore seeking to enforce an entirely different type of order. Although it does not arise for formal decision on this appeal and I do not rely on it for my overall conclusions, it is not in my view open to the father to choose to pursue partial enforcement in this way. At the very least it amounts to a significant change in circumstances since the Spanish orders.

(4) The order for the children to spend substantial time with their father is plainly in their interests and should be capable of being put into effect if he takes the necessary steps to ensure that the children can go to Spain and return reliably. We were told that this has not yet happened, but it is to be hoped that it will be done for the children's sake now that this appeal has been decided.

79. I would add that had the appeal been allowed on ground two, I would have taken some persuading that anything useful could be achieved by remitting the matter, as opposed to remaking the decision ourselves. The children have been subjected to continuous court proceedings in two jurisdictions since A was aged 9 and J aged 6. This is not a judgement on the contribution that both parents have undoubtedly made to this unhappy state of affairs, but there must come a point where the children are entitled to be relieved of the pressures of seven years of litigation that has brought them so little benefit.

80. I would dismiss the appeal.

Lord Justice Phillips

81. I agree.

Lord Justice Moylan

82. I also agree.