Neutral Citation Number: [2013] EWHC 647 (Fam)
Case No: FD10P01757/FD11P00240

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF PROCEEDINGS UNDER COUNCIL REGULATION (EC) No.2201/2003 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND THE MATTERS OF PARENTAL RESPONSIBILITY

AND IN THE MATTER OF 'S' A CHILD

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 25/03/2013

Before :
THE HONOURABLE MR JUSTICE COBB
- -

Between :

PB (mother) Applicant

- and -

SE (father) Respondent

Henry Setright QC (instructed by **Freemans**) for the **Mother**
The father in person

Hearing dates: 15 February 2013

Judgment

THE HON. MR. JUSTICE COBB

This judgment is being handed down in private on 25th March It consists of 14 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

The Hon. Mr. Justice Cobb :

1. This application concerns S, a boy aged 7. S's mother is PB (hereafter "the mother"), who is 53 years old, a British national and living in England. S's father is SE ("the father"), aged

44, a Spanish national living in southern Spain. S was born in Spain, and is currently living with his mother in England.

2. Regrettably S's parents disagree on many aspects of their joint parental responsibility for, and the arrangements for the division of their time with, S; they have, for much of the last three years, been litigating about him in the courts of Spain and England. The litigation history is complex, and while now legally interesting, a potential (or actual) jurisdictional 'anomaly' has arisen in which S is unfortunately caught. I am required to resolve that anomaly.

3. Specifically, the issues for me to determine are:

(a) Whether the Court of a Member State (the Spanish Court), which exercised jurisdiction in relation to S in October 2010, with the express agreement of the parties (involving prorogation by the mother), continues to exercise jurisdiction in respect of S notwithstanding the conclusion of those proceedings?

(b) If the Spanish Court does continue to exercise jurisdiction, whether I should take any steps to request that the Spanish Court transfer jurisdiction to the English Court, and if so, in the absence of actual court proceedings there, how should I do so?

(c) If the Spanish Court does not continue to exercise jurisdiction, whether the English Court can and should now exercise jurisdiction in respect of S?

History:

4. The mother is a trained legal executive and works for a firm of solicitors in the West Country of England; S is her third child, she has a son and a daughter from previous relationships who are now both adults. The father has been employed over the years in a number of jobs in Spain, on the land, as a street-sweeper, and as a waiter; S is his only child. The parents met in a nightclub on millennium eve, and some months later (October 2000), the mother moved to Spain, with her son and daughter, permanently to live. The mother and father moved in together shortly after the mother's arrival in Spain, and also for a period ran a small business together. S was born in May 2005. The parties never married.

5. Both parties have filed lengthy narrative statements within these proceedings; they both describe a stormy relationship. Both make serious allegations about the conduct of the other, during the relationship and in its demise. It has not been necessary for me to determine the truth of these allegations for the purposes of resolving the jurisdictional anomaly; I therefore confine myself in this judgment to summarising the uncontroversial aspects of the history.

6. The parties separated in 2009, and the mother came to live in this country in February 2010 bringing S with her; the father maintains that S was removed from Spain without his consent.

7. In March 2010, the father issued the equivalent of residence, contact, and prohibited steps proceedings in the First Instance 'County and Examining Court' of Torrox, Spain (although he did not issue proceedings under the Hague Convention), but withdrew those proceedings when he and the mother engaged in constructive negotiations about S's future care. In April 2010, the mother signed a 'convenio' (agreement) which detailed many aspects of S's future care and parental responsibility, including notably the grant of 'custody' to the mother with

provision for S to reside with her in England. The father did not in fact sign this 'convenio' but, instead, in June 2010 he re-instigated the court process in Spain in the same court with a fresh application for residence.

8. In late June, the mother flew to Spain with S, so that S could have contact with the father; when, after a few weeks, the father told the mother that he did not intend to return S to her, the mother instructed lawyers in England to issue an Originating Summons in Wardship in the English Court; she applied, without notice to the father, in the High Court for substantive relief.

9. On 9 July 2010, Baron J, relying on representations made by the mother or on her behalf, made an order declaring that S was habitually resident in England and Wales, that the courts of England and Wales had sole jurisdiction to determine issues concerning S, declaring the mother's rights of custody, and ordering S's return to his mother in England on or before 12 August 2010 (failing which the mother indicated that she would issue Hague Convention proceedings). As it happens, S was duly returned on the due date without the necessity for further court intervention.

10. In spite of the disputes referred to in paragraphs 7-9 above, the parties renewed their negotiations in Spain and a further draft 'convenio' was prepared, detailing again the arrangements for S's future care; on 21 July 2010, both parents signed it, and their signatures were witnessed by a court clerk in Spain. The 'convenio' provided for there to be "guardianship and child custody" of S to the mother living in England with "communications and visitations" to the father. The 'convenio' contained no clause reserving or retaining jurisdiction with any particular country, in the event of any future disputes.

11. The parties submitted the 'convenio' to the Spanish Court for approval, and on 20 October 2010 a Court Order was made in the First Instance 'County and Examining Court' of Torrox, in southern Spain. The Judge approved the 'convenio' and formally "adopted" the same.

12. It is appropriate to record that at the point at which the Spanish Court made this order, the mother in fact believed that it was the English Court which had primary jurisdiction to make orders in respect of S, by virtue of her conviction (reflected in her assertions before Baron J.) that S was habitually resident in this country. In submitting therefore to the jurisdiction of the Spanish Court in October 2010, she was (as she later acknowledged) proroguing that jurisdiction pursuant to the provisions of Article 12(3) Council Regulation (EC) No.2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (hereafter "BIIR"). The significance of this is discussed below.

13. The Order of the Spanish Court of 20 October 2010 brought to an end the Spanish proceedings which had been launched by the father in June 2010 (see para.7 above). The father told me, in his oral submissions, that in the months which followed he sought (without legal representation) to revive those proceedings, but failed to effectively to do so, as (he said) he did not know where the mother was living and could not serve her with any court papers. There is no evidence before me of any written application or (more pertinently) Court Order in Spain which post-dates that of 20 October 2010.

14. Less than two months passed before fresh proceedings concerning S were issued, this time in the English courts. On 17 December 2010, the mother issued an application under the

Children Act 1989 in the Principal Registry of the Family Division seeking a residence order, a variation of the contact arrangement contained in the 'convenio', and a specific issue order. The father was served with these proceedings; he countered this step by issuing proceedings in Spain and in England (by Originating Summons, just within the three month period contemplated by Article 41 and 47), seeking enforcement of the Order of 20 October 2010 and the 'convenio'. The combined proceedings were listed before Hedley J for directions in February 2011, and then substantively before Charles J. on 14 April 2011. The substantive hearing before Charles J. was adjourned part-heard; the part-heard hearing was finally re-listed for hearing on 16 December 2011.

15. By the time of the part-heard hearing (December 2011), the mother had instructed her current solicitors (Freemans), and leading Counsel. At that hearing the mother indicated that she would not, after all, resist enforcement of the Spanish Court Order (made on 20 October 2010). However, she made clear to the English Court that she was intending to apply in Spain for an order transferring any Spanish proceedings to England under Article 15 of BIIR. Charles J provided for enforcement of the Spanish Order of 20 October 2010, and a detailed schedule was appended to the order, setting out the specific arrangements for the parties to comply with the 'convenio'.

16. The 16 December 2011 order contains these important preambles:

> "And upon the Defendant mother confirming that
>
> (a) she now accepts that there was a prorogation of the Spanish jurisdiction within the meaning of Article 12(3) of Brussels II Revised leading to the making of the Spanish order, which order regulates the residence of and contact with the child;
>
> (b) she no longer seeks to resist the enforcement of the aforementioned Spanish order as sought by the father by his Originating Summons…
>
> AND UPON the Defendant mother informing the court through her leading counsel that she intends to issue (and has commenced steps in preparation for the issuing of) an application to transfer any jurisdiction as the courts of the jurisdiction of the Kingdom of Spain may continue to have in respect of the child herein, and particularly as regards variation of the terms of the aforementioned Spanish Order, to the jurisdiction of England and Wales pursuant to Article 15 of Brussels II Revised.
>
> AND UPON the Plaintiff father indicating his intention to oppose the mother's application for the transfer of jurisdiction from the Kingdom of Spain to England and Wales".

17. By the Order of 16 December 2011, the mother's applications under the inherent jurisdiction (9 July 2010) and under the Children Act 1989 (17 December 2010) were stayed. The Order further provided that if the Spanish Court declined the mother's application to transfer, the mother's applications would stand dismissed; if the Spanish Court granted the mother's application in Spain for transfer, the mother's applications in England would be listed before a Judge of the Family Division "for further consideration, [and] consequential directions".

18. Following the hearing before Charles J, and as indicated, the mother made her application in Spain. In that application (dated 20 December 2011):

(a) she asked the Spanish Court to declare that it lacked jurisdiction to deal with S or any proceedings concerning S,

alternatively

(b) in the event that the Spanish Court considered that it continued to have jurisdiction to hear proceedings concerning S, she requested under Article 15(2)(a) that the proceedings be transferred to England pursuant to Article 15(1) and Article 15(3)(a) on the basis that England had become the habitual residence of S after the court was seised, that the English Court would be better placed to deal with issues concerning S, and it would be in S's best interests.

19. That application was determined on paper, without notice to the father. On 29 February 2012 the Judge of the First Instance Court (Judge Aranda) made the following ruling:

"*The judgment delivered in these proceedings having become final, the proceedings having been filed and there being no other family proceedings pending between the parties in this court, there is no reason to declare the lack of jurisdiction applied for*".

20. The reference to the 'final' judgment appears to be a reference to the 20 October 2010 Order; the 'filing' of the proceedings means that they had been archived ("archivadas" in the original). This ruling did not specifically address the two alternative arguments raised by the mother (summarised in para. 18 above); the Spanish Judge did not expressly declare the absence of jurisdiction, nor did he deal expressly with the question of transfer.

21. There was some delay in the Spanish Court communicating its ruling to the parties, and further delays caused by public funding issues here. Consequently, the matter was only restored before the English Court on 16 November 2012 (Roderic Wood J.) for directions. He set up the hearing before me on 16 February 2013.

The parties positions before this Court

22. The mother, by Mr Setright, asks me to conclude that:

(a) the mother's prorogation of jurisdiction of the Spanish Court came to an end on 20 October 2010, with the making of the final order on that date;

(b) that as S is undoubtedly habitually resident in England, the English Courts should now assume jurisdiction under Article 8 BIIR (and as more than three months having elapsed since 20 October 2010, there can be no retained jurisdiction of the Spanish Court – under article 9);

alternatively

(c) if contrary to the contention in (a) above, I were to conclude that there is an enduring jurisdiction vested in the Spanish Court, by reason of the prorogation or otherwise (or there is doubt about this), then I ought to give consideration to

applying under Article 15(2)(c) to the Spanish Court for a transfer of the process to England.

23. I have been invited to interpret the Spanish Judge's ruling set out in para.19 above (issued on 29 February 2012) as indicating the Spanish Judge's acknowledgement that:

(1) A final order was made on 20 October 2010, and in the absence of fresh proceedings (and no new Article 12(3) prorogation), the Spanish court takes the view that it simply has no jurisdiction, and "no reason" to declare otherwise,

(2) In order to exercise jurisdiction to effect a transfer under Article 15, there needs to be some proceedings before the court to transfer, and as there are no current proceedings in Spain, there is nothing to transfer.

24. Mr Setright observes that the Spanish Court's 29 February 2012 ruling places S in something of a potential (if not actual) jurisdictional anomaly: the Spanish Court was the last to exercise effective jurisdiction, and the English proceedings were resolved in December 2011 on the basis that the mother accepted she had prorogued that jurisdiction and would return to it for guidance. If the October 2010 prorogation continues to endow the Spanish Courts with jurisdiction, but such jurisdiction is not being actually exercised, and if Article 15 is only applicable to extant proceedings (a proposition not conceded as correct by Mr Setright but one which may, as I have said, have been adopted by the Spanish Judge) by what means can a transfer of jurisdiction be addressed where indeed there are no 'live' proceedings currently before the Spanish court, and there appears to be nothing more tangible than an unexercised residual jurisdiction to transfer? By its ruling of the 29 February 2012, the Spanish Court does not appear anxious to assume (or resume) jurisdiction. Meanwhile, S has become habitually resident in England and Wales, for over two years, with the consent of both parents and endorsement of the Spanish Court.

25. The mother points out, by Mr Setright, that as S grows up, his needs will change, and the arrangements for the time he spends with his father may well need to be modified. It is contended that the English Court would be best placed to deal with these issues going forward, and not the Spanish Court whose involvement (and exercise of jurisdiction) is increasingly historic.

26. The father appeared before me in person, accompanied by his partner and assisted by an interpreter. For this hearing, he had filed a detailed Position Statement, setting out much of the history of the relationship of these parties; the Position Statement concludes with his analysis of the 'Legal Grounds' for the making of orders. In that section he discusses the provisions of Article 12(3), and emphasises that the mother "had expressly and unequivocally accepted the jurisdiction of the Spanish Courts" in October 2010. He adds that he is not in agreement to a transfer of jurisdiction.

27. The father amplified these written submissions orally at the hearing. He re-iterated that as the mother had consented to the Spanish Court exercising jurisdiction then the Spanish Court should be regarded as retaining jurisdiction.

28. In a Position Statement prepared on the father's behalf for the earlier hearing before Roderic Wood J on 16 November 2012 (when the father had been represented by solicitors and counsel) this argument had been given a more sophisticated hue: it had been argued by

counsel then instructed (Mr Michael Gration), that the father would assert that the "mother having prorogued jurisdiction in the Spanish Courts, that jurisdiction endures, notwithstanding the subsequent making of a final order within those proceedings".

BIIR

29. For the purposes of resolving the issue arising in these proceedings, it has been necessary to consider with some care the provisions of Article 12 and Article 15 of BIIR and their interplay; these provisions operate as exceptions to the general rule established by Article 8 (ibid.) that 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".

30. Article 12 describes (per *Re I (A Child) (Contact Application: Jurisdiction)* [2009] UKSC 10, [2010] 1 FLR 361) the arrangements by which parties may 'opt in' to the jurisdiction of an EU country which would not otherwise have jurisdiction to determine a child's future; this can arise in two situations:

(1) First, where the court of the Member State is exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment, in which case it is provided that the court shall have jurisdiction if the prescribed conditions are satisfied (i.e. the parties agree and it is in the superior interests of the child) in "any matter relating to parental responsibility connected with that application" (Article 12(1)); and

(2) Secondly, ("also" in the original) where the child has a substantial connection with that Member State (e.g. where one of the holders of parental responsibility is habitually resident in that Member State or the child is a national of that state), and the jurisdiction of the court "has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child" (Article 12(3)).

31. Article 12(2) defines the precise circumstances in which the jurisdiction of the Court of the Member State in relation to parental responsibility ceases where that jurisdiction has been prorogued under Article 12(1); this provides important clarity given that any parallel proceedings under the divorce jurisdiction and associated parental responsibility jurisdiction may not end simultaneously. I regard it as significant that Article 12(2) specifically provides for the prorogued jurisdiction of a court of a Member State to come to an end when the second set of parallel proceedings concludes. There is no specific provision in BIIR to define the termination of the jurisdiction where that jurisdiction has been prorogued under Article 12(3).

32. The regime for effecting and terminating a prorogation appears to be self-contained within Article 12. Specifically, as Parker J made clear in *AP v TD (Relocation: Retention of Jurisdiction)* [2010] EWHC 2040 (Fam) [2011] 1 FLR 1851, the jurisdiction of one court, bestowed by prorogation, cannot be brought to an end by the act of another court, particularly pursuant to a unilateral step taken by one of the parties (see [2010] EWHC 2040 at [70]). Nor can the jurisdiction be brought to an end by the withdrawal of an unequivocal and express acceptance of jurisdiction of the prorogued court (see [2010] EWHC 2040 at [76] and [78], and see Baroness Hale in *Re I* at [23]: "Certainly a party who has once accepted jurisdiction should not be able to withdraw it at any time before the conclusion of the case. Acceptance of

jurisdiction must include acceptance of the court's decision whatever it may be. Otherwise there would be no point in submitting to the court's jurisdiction."). Therefore if the Spanish jurisdiction endures in the instant case, no act or order of this court could bring the jurisdiction of the Spanish Court to an end; moreover, this mother could not withdraw her consent to an enduring prorogation of that other jurisdiction.

33. In fact, in that case (*AP v TD (Relocation: Retention of Jurisdiction)*) the English court continued to exercise a prorogued jurisdiction here in relation to children who had been moved abroad (to Canada), where there had been agreement between the parties that the English Court would continue to exercise jurisdiction in relation to the children, and there had been an express reservation of jurisdiction clause in the court order. In the instant case, by contrast, (and as mentioned above) there had been no clause either in the 'convenio' or in the 20 October 2010 order, reserving jurisdiction to the Courts of Spain.

34. Article 15(1) also operates as an explicit "exception" to Article 8, providing for courts of Member States having jurisdiction as to the substance of the matter to "stay the case" or "request a court of another Member State to assume jurisdiction" in circumstances where:

> "*they consider that a court of another Member State with which the child has a particular connection would be better placed to hear the case or a specific part thereof, and where this is in the best interests of the child*"

35. Article 15(3) sets out the five independent 'gateways' by which the "particular connection" in Article 15(1) can be established.

36. There was discussion in the hearing as to whether Article 15 applies to a general 'territorial jurisdiction' or to 'jurisdiction established by the institution of proceedings'. I have considered the language of the Article with care, and believe it to be the latter. The Article refers to a court of a Member State hearing "the case or a specific part thereof" (Article 15(1)); there is further reference in Article 15(1)(a) to 'staying' the "case". In my judgment, the transfer arrangements described in Article 15 have been designed to apply to specific current (i.e. 'live') proceedings before a court of a Member State, not to its territorial jurisdiction generally. The judgments in *Re I* (citation above) are, in my view, consistent with this ruling.

37. Article 15(2)(c) could be deployed if I considered that there were proceedings in Spain to transfer, and that it would be appropriate to make that request (see below).

International Judicial Liaison

38. In view of the potential, if not real, anomaly created for S in these circumstances, and the lack of clarity surrounding the ruling from the Spanish Court (29 February 2012), I considered it appropriate to make contact with the Spanish Network Judge (designated under BIIR), to seek assistance on the stance of the Spanish Court to the issues in play in this dispute. I invited the lawyer at the Office of the Head of International Family Justice in England to communicate with the Spanish Network Judge in Spain, by e-mail on 18 February 2013. I specifically asked the following questions:

(1) Can any assistance be offered as to how I should interpret the Judge's ruling (i.e. of 29 February 2012)?

(2) Generally, would the Spanish Court consider that it has any continuing jurisdiction in relation to a child in these circumstances, where although the mother prorogued the jurisdiction of the Spanish Court in the past (i.e. in October 2010), those proceedings have now concluded (Order 20 October 2010), there are no fresh proceedings, and the child is now habitually resident in another Member State?

(3) Put another way, does the Spanish Court regard the prorogation in October 2010 as endowing it with continuing jurisdiction in relation to all subsequent proceedings concerning the child for the balance of his minority or until/unless the proceedings are transferred under Article 15 elsewhere?

(4) If the Spanish Court considered that it did continue to exercise some jurisdiction in relation to S - by virtue of the October 2010 prorogation or otherwise - how would it be likely to view an application by this Court to transfer any proceedings to the Courts of England and Wales pursuant to Article 15(2)(c), and what mechanism would be proposed to achieve this (in the absence of any active proceedings in Spain)?

39. Unfortunately, a number of delays beset the obtaining of answers to these questions, none the least because Judge Aranda was heavily committed with work in his court. The reply was received (in translation) only on 15 March 2013. The key passage of the response is as follows:

> "*By Order of 29th February 2012, I considered that it was not appropriate to declare the lack of competency with regards to Ms [PB], by understanding that the actions were filed and there were no other proceedings between the parties, and so on as requested by Judge Cobb, I understand that in accordance with the articles 8 and 9.1 of Regulation 2201/2003, the child has for more than two years been living in the UK with his mother, and there is NO ROOM FOR EXTENSION OF JURISDICTION OF THE COURT No 1 OF TORROX.*
>
> *Notwithstanding the above, and if I had considered that I was still the Judge, I would not oppose to a remission of the case as is stated in article 15 because the requirements for it concur with what is stated in this legislation. Nonetheless, I understand that I am not competent and that the child's best interests are more effectively safeguarded if these issues concerning parental responsibility are considered by the English Courts.*"
> [Capitals in the original]

Discussion

40. There can be little doubt that proceedings initially brought in Spain by the father (in March 2010) were properly brought there, given S's habitual residence in Spain up to that time (see Article 8 BIIR).

41. There can also be little doubt that at some point in 2010, S acquired habitual residence in England in accordance with the principles in *Mercredi-v-Chaffe* Case C-497/10 PPU (22.12.10); [2011] 1 FLR 1293 (at paras [47]-[56]).

42. There was a dispute (which I have not had to resolve) as to when S's habitual residence actually changed, and when he acquired habitual residence in England. The mother

contended in the English Courts that S had acquired habitual residence in England after she brought him here in February 2010 and in any event by 9 July 2010 (when appearing before Baron J). That position was not accepted by the father. However, in my judgment, there can be little doubt that all of the necessary factors to attribute habitual residence of S in England were in place for him after 21 July 2010, when both parties signed the 'convenio' agreeing that the guardianship and child custody of S should vest with the mother, and that S should live with the mother in England. S was of course physically living in England at that time, he had been living in England for some time by then, he has been in England since that time, and throughout the period, he has been and is in school here.

43. If the Spanish Court had been exercising jurisdiction founded on Article 8 on 20 October 2010 (on the basis that S had been habitually resident there at that time), the transfer of jurisdiction thereafter to England would have been automatic (see Article 9) once the Spanish court endorsed the removal of S from the jurisdiction to live with his mother in England. On the facts of this case, the transfer could have been expected to be fully effective from 20th January 2011 (given the 3-month 'exception': Article 9). But that was not the case.

44. On 20 October 2010, the Spanish Court was not exercising a straight Article 8 jurisdiction: (a) S was probably not, in my finding, habitually resident in Spain at that time and in any event, materially, (b) the mother plainly did not believe that it was, and expressly accepted the jurisdiction of the Spanish Court on a different basis. When the 'convenio' was submitted to the Spanish Court in October 2010 for approval, this was (as the mother acknowledges) by her proroguing the jurisdiction of the Spanish Court under Article 12(3) of BIIR. The key question for determination now is whether that prorogation survives beyond the making of the final order in the relevant proceedings.

45. In my judgment prorogation of the jurisdiction of the court of a Member State under Article 12(3), endures until there has been a final 'judgment' in those proceedings (by analogy with Article 12(2)), and does not persist beyond that point (i.e. for the minority of the child or some other period). I so find for the following reasons.

46. First, Article 12(3) is only brought into play where there is agreement to the court exercising jurisdiction and that agreement is to be given "at the time when the court is seised"; this language, in my judgment, contemplates that 'agreement' is assessed in the context of the particular proceedings to which it relates. The Practice Guide to BIIR supports such an interpretation providing that:

> "The question of jurisdiction is determined at the time the court is seised. Once a competent court is seised, in principle it retains jurisdiction even if the child acquires habitual residence in another Member State during the course of the court proceeding (principle of '*perpetuatio fori*'). A change of habitual residence of the child while the proceeding is pending does therefore not itself entail a change of jurisdiction.

However, if it is in the best interests of the child, Article 15 provides for the possible transfer of the case, subject to certain conditions, to a court of the Member State to which the child has moved. If a child's habitual residence changes as a result of a wrongful removal or retention, jurisdiction may only shift under very strict conditions"

The references to habitual residence changing "during the course of the court proceeding", and "while the proceeding is pending" in the passage of the Practice Guide (above) appears to

contemplate that the prorogation continues only for the life of the proceedings. This interpretation is consistent, in my judgment, with the approach of the Supreme Court in *Re I* (citation above) at [23]-[32]).

47. Secondly, prorogation under Article 12(1) is not, it appears, open-ended; it does not survive beyond the conclusion of the second set of parallel proceedings in a divorce case (Article 3) (see discussion of Article 12(2) above). Such prorogation comes to an end *either* when the proceedings bringing the marriage to an end conclude with a final judgment, *or* the parental responsibility proceedings conclude with a final judgment whichever is the later (unless the proceedings have come to an end for a different reason: Article 12(2)(c)). In my judgment, it would only be consistent with the scheme under Article 12(1) for the scheme under Article 12(3) to apply in the same way, and for the jurisdiction to 'cease' when the judgment has become final.

48. Thirdly, a consequence, I fear, of holding that Article 12(3) prorogation continues for the duration of a child's childhood (and not just for the duration of the proceedings) as the father contends, would be that parents may be discouraged from using the mechanism provided for in Article 12(3) to submit to a jurisdiction for a particular purpose, when it is appropriate for them to do so, as indeed happened here.

49. Finally, if prorogation under Article 12(3) was deemed to confer jurisdiction beyond the end of the proceedings to which agreement is given (i.e. for the minority of a child), courts of a Member State would be likely to find themselves more commonly in the situation facing the court here, looking to achieve a transfer of jurisdiction where there may be no extant proceedings in the other court, to a court of a State where the child has (perhaps by long-standing arrangements) become habitually resident. At best this would be unnecessarily cumbersome; at worse (for reasons explained below) not possible without active proceedings in the prorogued state.

50. To some extent, my separate consideration of the Article 15 'transfer' regime fortified my view that prorogation does not continue beyond the end of the life of the proceedings.

51. As I found above (see para.36 above) the transfer arrangements described in Article 15 are designed to apply to specific current (i.e. 'live') proceedings before a court of a Member State, not to its jurisdiction generally. If there are no 'live' proceedings, there is nothing to transfer. It could not be right, in my view, for the jurisdiction of a Member State which has been established through prorogation (Article 12(3)) to survive beyond the completion of proceedings, when the effect would be to frustrate the legitimate wish of a court of another Member State (where the child is habitually resident) from exercising effective jurisdiction.

52. In this case, the father's application was brought to an end on 20 October 2010. There are no fresh proceedings in Spain. There are no proceedings to transfer. The mother does not consent now to proceedings taking place in Spain. It would hardly be consistent with the otherwise pragmatic and internally-harmonised rules contained in BIIR to hold that the Spanish Court maintained its primary jurisdiction.

53. I note (see para.39 above) that Judge Aranda agrees.

54. I do not consider that I therefore need to request a transfer under Article 15. For completeness' sake, had I considered that I did need to do so, I would have regarded the

current case as distinguishable on the facts from the decision of Munby J (as he then was) in the case of *AB v JLB (Brussels II Revised: Article 15)* [2008] EWHC 2965 [2009] 1 FLR 517. In *AB v JLB*, Munby J refused to make an Article 15(2)(c) request of the court in The Hague, where the Hague Court had plainly made a determination against transfer already on the merits (see [38]-[40] and [44]). On any view, the 29 February 2012 ruling was not a determination of transfer on the merits. Judge Aranda's recent communication appears to confirm this.

Conclusion

55. It follows from the above, that I am satisfied as follows:

(1) That the prorogation of the Spanish Court under Article 12(3) by the mother came to an end with the making of the final order on 20 October 2010;

(2) There is no residual jurisdiction in Spain;

(3) I do not need to seek a transfer; in any event, there are no current proceedings in Spain to transfer to this jurisdiction pursuant to Article 15;

(4) The Court of England and Wales can properly assume jurisdiction to determine issues relating to S pursuant to Article 8 of BIIR.

56. This conclusion corresponds, in my judgment, with the need for there to be a genuine and accessible jurisdiction available to the parents to determine questions concerning parental responsibility for S in circumstances where they are unable to agree arrangements. That jurisdiction needs to be one which can be readily accessed as S grows older. I am satisfied that, in accordance with the spirit of the international treaties, the best place for S's future to be decided is in the court of country of S's lawful habitual residence, where evidence of his daily life can be found, and where welfare enquiries can be more easily made.

57. I shall therefore list the proceedings for directions as a matter of urgency, so that, in the absence of agreement on the substantive issues, the parties can now concentrate on assisting the Court to make some proper welfare-based decisions for S.

End.