4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

Re SJ (A Child) (Habitual Residence: Application to Set Aside) [2014]

[2014] EWHC 58 (Fam)

22/01/2014

Barristers
Mark Jarman KC

Court
High Court (Family Division)

Practice Areas
International Children Law

Summary
Judgment of Parker J on the issue of whether proceedings concerning a 9 year old girl should be heard in England or Spain, and whether the child should be returned to England from Spain.

Facts
Proceedings were afoot in relation to the subject child, S, in both England and Spain. F sought the immediate return of S to the England and for orders to be made concerning residence and contact. M invited the court to allow matters to proceed in Spain.

M had removed S to Gibraltar in September 2011 with F's agreement, albeit on F's case for a limited period of 1-2 years only. M subsequently removed S to Spain without F's knowledge or consent. In August 2012 F withdrew his consent to S remaining abroad and sought her return within 1 month. M did not comply and at the date of the hearing remained with S in Spain.

In November 2012 F launched proceedings in the Guildford County Court for section 8 orders, including a specific issue order for the return of S from Spain. A hearing took place in December 2012, the mother participating by video link. HHJ Nathan went on to find, without hearing evidence, that S was habitually resident in England and Wales and that accordingly the English Court had jurisdiction.

M subsequently raised allegations that F had sexually abused S and made an ex parte application to the Spanish Court for precautionary measures. Meanwhile, HHJ Nathan transferred the English proceedings to the High Court and at a hearing in February 2013, which M again attended by video link, Theis J declared that S had been wrongfully retained by M. In April 2013 further declarations were made by HHJ Nathan including that, as England was first seised, the Spanish proceedings should be stayed. Later that same month M's application for precautionary measures in Spain was refused with costs.

In May 2013 F's Hague application in Spain was heard and judgment was handed down in June 2013,

refusing F's application for a return order but apparently ceding jurisdiction to the English court. F appealed the refusal; at the date of the hearing before Parker J the appeal remained undetermined.

M subsequently applied to set aside the declarations already made, which matter came before Parker J. Her Ladyship refused the application on the basis that (i) HHJ Nathan was referred to the correct principles and was entitled to reach the conclusion that he did on the facts (ii) if M wished to challenge the decision she should seek permission to appeal (applying *Lloyd's Investment (Scandinavia) Ltd v Ager Hanssen* [2003] EWHC 1740 (Ch).

Held

The other issue before Parker J was F's application for a return order under Article 11. Her Ladyship determined that in order to establish whether Art 11(8) is engaged, it would first be necessary to ascertain from the Spanish liaison judge whether the refusal of the return order was on the basis that S (i) was not wrongfully removed or retained or (ii) because F had given consent. Accordingly, the return application was adjourned pending a response from the Spanish liaison judge, or in default to be determined on the basis of the available material in four weeks' time. In the meantime, Parker J declined M's application to transfer the matter to Spain pursuant to Article 15, describing the case as one of "blatant… forum shopping".

Permission