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Re N (A Minor) [2014]

[2014] EWHC 749 (Fam)

12/03/2014

Barristers
Jacqueline Renton

Court
High Court (Family Division)

Practice Areas
International Children Law

Summary
Applications under Hague Convention on the civil aspects of child abduction for summary return of child to Spain and under Brussels II Rev. for recognition and enforcement of Spanish order.

Facts
The Mother and Father had one child together, N, who was 5 years old. The Mother had another child from a previous relationship, J, aged nearly 8. The Mother was of British origin and the Father Morroccan, although he lived in Spain. The parties had met in Spain in 2007 and soon began living together in a small village in Southern Spain. The Mother's parents lived in the same village. N was a British citizen and had a British passport. The parties separated in the summer of 2009. There was a dispute between them as to how N divided his time between separation and the Mother's subsequent move back to England in March 2010. When she returned, she brought J with her, but N remained in Spain. She then had a further child with another man in March 2011 although by the time of the hearing before Holman J was no longer living with that man. There was a dispute between the parties as to how much time N had spent with the Father as opposed to the maternal grandparents during the time when he remained in Spain following the Mother's move.

During 2011 there were "custody" proceedings in Spain which culminated in October 2011 with the Court granting custody to the Mother and permitting her to move to England with N. The Father appealed that order. Notwithstanding that the Father's appeal was still pending, the Mother sought, and on 23 April 2012 obtained, "provisional enforcement" of the Spanish order, allowing her to move back to England prior to the appeal being decided. She offered to the Spanish Court a "public commitment" (which Holman J likened to an undertaking) to obey the order of the Spanish Court should the outcome of the Father's appeal be that N was ordered to return to Spain.

The Father's appeal in Spain was successful and on 20 December 2012 three judges of the appeal court granted the Father custody and ordered that the child's domicile should be the Father's address in Spain.

The Mother did not comply with the Spanish order (despite taking no steps to appeal it) and remained in England with N.

The Father made prompt, albeit misguided, steps in Spain to try to enforce the order there. Upon his learning of the provisions of the Hague Convention on the civil aspects of child abduction he made an application in England under it on 11 December 2013 for the summary return of N. The Father's initial application in England was made only under the Hague Convention out of practicality: his solicitors reported that it was a quicker process to obtain legal aid (which was non-means tested and non-merits tested) for an order for summary return under that convention than it was for an application under Brussels II Revised for recognition (under Article 21) and enforcement (under Article 28) of the order. Pursuant to an indication by the Court that an application should also be made under Brussels II Revised (and that public funding should be granted for the same) the Father duly applied under that convention as well.

The Mother in turn applied for a residence order under section 8 of the Children Act 1989.

The parties' respective applications came before Holman J. He held that he needed to determine the Father's application for recognition and enforcement of the Spanish order before his application under the Hague Convention, because if the recognition and enforcement application was granted, a return of N to Spain would necessarily flow from that. Conversely, should the Father's application for return not succeed, his application for a summary return under the Hague Convention would necessarily fail, as it would be "perverse" to hold that N had been wrongfully retained in England if the Spanish order were not to be enforced (paragraphs 26 to 28).

It was submitted on behalf of the Mother that there had to be, at least concurrently with consideration of the Father's application, a full welfare hearing of the Mother's application for residence. Her case was that there had been a jurisdictional break from Spain when the order permitting the provisional enforcement of the original order was made and that, in any event, England and Wales now had jurisdiction owing to the child being habitually resident here.

Holman J considered that there had not been a "jurisdictional break" from Spain, given that the Mother had only been permitted to move to England provisionally on the basis on an undertaking to comply with any subsequent order of the Spanish Court and the orders of the Spanish Court following the Father's appeal had been of the effect to order the child's return to Spain, that he be domiciled there. In respect of the Mother's argument that England and Wales had jurisdiction and therefore her residence application had to be considered, Holman J accepted that nowhere in the Brussels II Revised convention is there any priority afforded either to Chapter 2 (Jurisdiction) or Chapter 3 (Recognition and Enforcement. He held, however, that considered as a whole, the convention required that he consider the application for recognition and enforcement of the Spanish order now. He commented that if that application was not successful, a wider welfare enquiry might follow.

Held

Holman J recalled the authorities relating to applications for enforcement and recognition under Brussels II Revised, which culminate in the decision of the Court of Appeal in *Re L (Brussels II Revised: Appeal)* [2013] 1 FLR 430. He noted that recognition and enforcement are separate issues, but in relation to both, the only ground on which the Court could not recognise or enforce an order was if it would be "manifestly contrary to public policy … taking into account the best interests of the child". The bar is a high one and the test is public policy, not welfare as such.

He determined that the passage of time since the Mother's return to England did not constitute a good

enough reason why it would be contrary to the public policy of this jurisdiction to refuse to recognise and to enforce the Spanish order. He referred to the decision of Roderic Wood J in *LAB v KB (Abduction: Brussels II Revised)* [2009] EWHC 2243 (Fam) in which an even more "stale" order of a foreign court had been enforced. He had directed a brief welfare enquiry by Cafcass which indicated that the N was settled in the Mother's care but he also noted that the Spanish Court had held the Father to be able to care for N also. A return to Spain would be disruptive for N, but the delay was the Mother's doing in disobeying the order despite the prompt steps taken by the Father to enforce it. The disruption to N in this case would not constitute such a compelling reason as to warrant the Court refusing to recognise and enforce the Spanish order.

Holman J noted that the parties had agreed the mechanics of the return of N to Spain if that were to be the result of this hearing and his order would reflect the agreed arrangements.